

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

MARCH 15, 2005

+ + + + +

The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, D.C. 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE MILLER	Vice-Chairperson
CURTIS ETHERLY, JR.	Board Member
JOHN MANN, II	NCPC

ZONING COMMISSION MEMBER PRESENT:

KEVIN HILDEBRAND	Commission Member
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Deputy Secretary
JOHN NYARKU	Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL:

LORI MONROE, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

Travis Parker
David McGettigan

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This transcript constitutes the minutes
from the public hearing held on March 15, 2005.

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P-R-O-C-E-E-D-I-N-G-S

9:44 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. I'm going to call to order the 15th of March 2005 morning public hearing of the Board of Zoning Adjustment for the District of Columbia.

My name is Geoff Griffis, Chairperson.

Joining me today is the Vice Chair, Ms. Miller and representing the National Capital Planning Commission is Mr. Mann with us.

We do not have a Zoning Commission member with us this morning and we are anticipating Mr. Etherly to be here shortly, but we shall continue on with our business.

Copies of today's hearing agenda are available for you. You can pick it up where you -- they are on the wall where you entered into the hearing. You can see where you are on our scheduled for this morning.

There are several important things to go through in the opening remarks.

First of all, all hearings and procedures before the Board of Zoning Adjustment are recorded. They are recorded in two fashions. First, the

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1 official transcript is being created by the court
2 reporter who is sitting on the floor to my right.

3 Secondly, we are being broadcast live on the
4 Office of Zoning's website.

5 Attendant to both of those, we ask that
6 people do several things. First, I'd ask that people
7 turn off their cell phones and beepers at this time so
8 we don't have a disruption of the hearing procedures.

9 Secondly, when coming forward to speak to
10 the Board prior to making yourself comfortable in
11 front at the table, I would ask that you fill out two
12 witness cards. Witness cards are available at the
13 table where you entered into the hearing room and also
14 the table in front of us where you will provide
15 testimony. Those two cards go to the recorder prior
16 to coming forward to speak to the Board.

17 When you are ready to address the Board, I
18 would ask that you state your name and address once
19 prior to starting. That way, obviously, we can give
20 you credit for all the important things that you will
21 state for the Board.

22 The order of procedure for special
23 exceptions and variances is first we hear from the
24 applicant and their case presentation, witnesses, and
25 anything else that they would like to tell us that is

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1 pertinent and germane to the case.

2 Second, we will hear all Government
3 reports that have been submitted into the record.

4 Third, we would hear from the Advisory
5 Neighborhood Commission within which the property is
6 located.

7 Fourth, we'll hear from persons or parties
8 in opposition to a -- or rather in support of the
9 case.

10 Fifth, would be persons or parties in
11 opposition to a case.

12 And, sixth, finally, would be closing
13 remarks, rebuttal witnesses, and summations by the
14 applicant.

15 Six steps. They will go very quickly this
16 morning I do hope.

17 Cross examination is permitted by the
18 applicant and parties within a case. The ANC within
19 which the property is located is automatically a party
20 in the case and, therefore, would allow -- be allowed
21 to conduct cross examination.

22 I will give further instruction on cross
23 examination if it is critical or pertinent to any of
24 the cases that we call this morning.

25 The record will be closed at the

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1 conclusion of the hearing on each case except for any
2 material that is specifically requested by this Board
3 and we will be very specific as to additional
4 information that should to be submitted into the
5 Office of Zoning and when that information should be
6 submitted.

7 This would be because the Board wants
8 further information that isn't presented in a case or
9 wants clarification of certain issues. Again, we will
10 be very clear as to what is to be submitted and when
11 it is to be submitted into the Office of Zoning.

12 After that material is received, it should
13 be well understood that the case and record would be
14 closed and no other information would accepted into
15 the record.

16 The Sunshine Act requires that the Board
17 conduct its hearing and procedures in the open and
18 before the public. This Board may enter into
19 executive sessions both during or after a hearing on a
20 case and that would be for the purposes of reviewing
21 the record or deliberating on a case. This would be
22 in accordance with our rules of procedure and
23 regulations. It would also be in accordance with the
24 Sunshine Act.

25 The decision of the Board in contested

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1 cases of which all the cases before the Board of
2 Zoning Adjustment are and contested cases must be
3 based exclusively on the record that's created before
4 us. That's why I've gone on with such length of what
5 the record is and how we're going to create the
6 record.

7 That being said, we ask that people
8 present today not engage Board members in private
9 conversations today so that we do not give the
10 appearance of receiving information outside of the
11 record that's created before us in this public forum.

12 Let me ask all those who are here today
13 who are proposing to give testimony today, thinking
14 about or definitely going to give testimony, I would
15 ask that you please stand and give your attention to
16 Mr. Nyarku who's at the very end with the Office of
17 Zoning. He is going to swear you in or Mr. Moy will.

18 There it is. Mr. Moy with the Office of Zoning.

19 Anyone prepared to give testimony, I'm
20 going to have you be sworn in. If you're going to
21 speak to the Board at all, address the Board, you're
22 going to need to be sworn in.

23 Ma'am, are you contemplating talking to
24 the Board? Absolutely. Excellent. Thank you all
25 very much.

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1 Mr. Moy, it's all you.

2 MR. MOY: Thank you, Mr. Chairman. Do you
3 solemnly swear or affirm that the testimony you're
4 about to give in this proceeding is the truth, the
5 whole truth, and nothing but the truth?

6 CHAIRPERSON GRIFFIS: Good. Thank you all
7 very much and thank you, Mr. Moy, and a very good
8 morning to you.

9 Mr. Moy is with the Office of Zoning. On
10 the far right is Mr. Nyarku who is also with the
11 Office of Zoning. Representing the Office of Attorney
12 General is Ms. Monroe sitting between them. Mr.
13 Etherly has joined us and a very good morning to you.

14 Let me continue then and the Board at this
15 time can consider any preliminary matters.
16 Preliminary matters are those which relate to whether
17 a case will or should be heard today, requests for
18 postponements, withdrawals or whether proper and
19 adequate notice are elements of preliminary matters.

20 If you are not prepared to go forward with
21 a case this morning or you believe the Board should
22 not proceed with a case on its schedule this morning,
23 I'd ask that you come forward and have a seat at the
24 table in front of us as an indication of a preliminary
25 matter.

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1 Mr. Moy, let me turn to you and again say
2 a very good morning and are you aware of any
3 preliminary matters for us?

4 MR. MOY: No, sir, Mr. Chairman. They can
5 be handled individually.

6 CHAIRPERSON GRIFFIS: Excellent. Thank
7 you very much.

8 Good morning, ma'am. I understand that
9 you have a preliminary matter by coming forward.

10 If you wouldn't mind, just touching the --
11 have a seat. Touch the base of the microphone there
12 or turn it on. If you wouldn't -- if you would,
13 please provide your name and address for the record.

14 MS. DALZELL-PAYNE: Geraldine Dalzell-
15 Payne, 3707 S Street, N.W.

16 CHAIRPERSON GRIFFIS: Excellent and your
17 preliminary matter is?

18 MS. DALZELL-PAYNE: I -- I believe this
19 case does not need to be heard because I have reviewed
20 -- I mean I have new plans showing that we're building
21 all the way to the property line.

22 CHAIRPERSON GRIFFIS: Okay. And your Case
23 Application is 17292.

24 MS. DALZELL-PAYNE: We do not have open
25 courts. There are no open courts.

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1 CHAIRPERSON GRIFFIS: And you're saying
2 that you've redesigned this in order to not require
3 relief from the open court. Is that correct?

4 MS. DALZELL-PAYNE: That's correct.

5 CHAIRPERSON GRIFFIS: Okay. So, you're
6 just submitting and you're withdrawing your
7 application. Is that --

8 MS. DALZELL-PAYNE: Yes, please.

9 CHAIRPERSON GRIFFIS: Excellent. Why
10 don't we have those plans put in. You can give it to
11 Mr. Nyarku who is the very far. He'll distribute it
12 and also put it into the official record.

13 If I understand that correctly, then the
14 application is being withdrawn. No official action
15 will be required by the Board.

16 Ms. Monroe, do you agree?

17 MS. MONROE: Yes, that's correct.

18 CHAIRPERSON GRIFFIS: Well, let's get that
19 on the record. There's just some concern -- frankly,
20 you've -- if we accept, well, accept or not, you
21 stated that you're going to withdraw the application.

22 However, just for quick clarification, the
23 Office of Planning, has DCRA looked at these drawings?

24 MS. DALZELL-PAYNE: Yes, they did.

25 CHAIRPERSON GRIFFIS: The revisions?

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1 MS. DALZELL-PAYNE: Yes, they did.

2
3 CHAIRPERSON GRIFFIS: They have? And what
4 -- what has DCRA indicated?

5 MS. DALZELL-PAYNE: Ms. Rochelle indicated
6 that there were two open courts which I cannot see. I
7 cannot see two open courts on my plans which were
8 presented to her last week.

9 CHAIRPERSON GRIFFIS: Do you see an open
10 court? Very well.

11 This is what I suggest. If there's some
12 question about whether DCRA actually sees this as not
13 needing any sort of relief which all, of course, would
14 not allow you to come back for 90 days --

15 MS. DALZELL-PAYNE: Oh, then I don't want
16 to -- I don't want to withdraw just in case.

17 CHAIRPERSON GRIFFIS: Exactly.

18 MS. DALZELL-PAYNE: Yes.

19 CHAIRPERSON GRIFFIS: So, taken care of
20 you here. What we're going to do is set this for a
21 continuance with -- I guess we'll set this out 60
22 days. Put it on the schedule and you're going to be
23 in communication with Office of Zoning depending on
24 whether that needs to go forward or not.

25 You're also going to need to post the

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1 property as my indication is it was not properly
2 posted for the amount of time. So, we couldn't go
3 forward with this today even if we wanted to, but that
4 being said, is that amenable to you?

5 MS. DALZELL-PAYNE: Yes, that's fine, but
6 was I suppose to post something? I was?

7 CHAIRPERSON GRIFFIS: Oh, absolutely.

8 MS. DALZELL-PAYNE: Oh. I didn't realize.

9 CHAIRPERSON GRIFFIS: So, this will give
10 you plenty of time to get that requirement and pick up
11 your nice Halloween-colored placard --

12 MS. DALZELL-PAYNE: Okay. Okay.

13 CHAIRPERSON GRIFFIS: -- that will go onto
14 your property and the -- the staff at the Office of
15 Zoning right next door can give you all the indication
16 and requirements for that.

17 Okay. So, the date would be? What do we
18 got? March, April.

19 MR. MOY: May --

20 CHAIRPERSON GRIFFIS: Twenty-fourth.

21 MR. MOY: -- May 17th, sir.

22 CHAIRPERSON GRIFFIS: No, let's go to the
23 24th in the morning.

24 MR. MOY: Twenty-fourth. Good.

25 CHAIRPERSON GRIFFIS: The morning of May

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1 on the 24th. That would still be 2005. Very well.

2 MS. DALZELL-PAYNE: Thank you.

3 CHAIRPERSON GRIFFIS: This is the only
4 public notice that we're going to be giving in terms
5 of the --

6 MS. DALZELL-PAYNE: Yes.

7 CHAIRPERSON GRIFFIS: -- continuation and
8 the date. So, if there's any questions, it is your
9 responsibility obviously to keep track of everything
10 that's in the file.

11 MS. DALZELL-PAYNE: Okay.

12 CHAIRPERSON GRIFFIS: And keep track and
13 implement all the regulations.

14 So, probably not a bad idea just to stop
15 next door --

16 MS. DALZELL-PAYNE: Yes.

17 CHAIRPERSON GRIFFIS: -- and talk to the
18 excellent staff that's there.

19 MS. DALZELL-PAYNE: All right. Thank you.

20 CHAIRPERSON GRIFFIS: Good. Thank you very
21 much.

22 If there's nothing further on this case
23 then, Mr. Moy, why don't we move on to the next case
24 in the morning.

25 MR. MOY: Yes, sir. The next case is

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1 Application Number 17291 of Mark Bailen and Jessica
2 Rosenworcel pursuant to 11 DCMR 3103.2 for variance
3 from the floor area ratio requirements under section
4 402 and the nonconforming structure provisions under
5 subsection 2001.3 to allow an addition to an existing
6 row dwelling in the DC/R-5-B District at premises 1410
7 21st Street, N.W. That's in Square 68, Lot 848.

8 CHAIRPERSON GRIFFIS: Ready, Mr. Gell?

9 MR. GELL: Yes, Mr. Chairman.

10 Mr. Chairman, this is a request for a
11 variance for FAR for a three-story structure plus
12 basement on 1410 21st Street, N.W., Square 68, Lot 848
13 owned by Mark Bailen and Jessica Rosenworcel. It's in
14 the Dupont Circle historic district.

15 I'm going to ask Mr. Bailen to make a
16 statement and then I'll have some more -- more things
17 to say, but I think it would be good to get some of
18 the basic facts on the -- on the record. Thank you.

19 CHAIRPERSON GRIFFIS: Good.

20 MR. GELL: Oh, I'm -- I'm sorry. Before
21 we do that, I did have a request in for Christian
22 Zapatka, the architect --

23 CHAIRPERSON GRIFFIS: For an expert
24 witness?

25 MR. GELL: -- to be -- to be recognize as

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1 an expert.

2 CHAIRPERSON GRIFFIS: Okay. And I'm
3 assuming that it's an expert in architectural design.
4 Is that correct?

5 MR. GELL: That -- that is correct. Yes.

6 CHAIRPERSON GRIFFIS: Okay. Any
7 difficulties with that? We did have the résumé and
8 attached -- yes, he has actually been established
9 before. Any other questions?

10 Give him a little bit of a hard time.
11 Right? Think I'm easy.

12 I don't see any difficulty in establishing
13 that, Mr. Gell. Let's move ahead then.

14 MR. GELL: Yes, thank you. Mr. Bailen's
15 got a statement now.

16 CHAIRPERSON GRIFFIS: Good.

17 MR. BAILEN: Mr. Chairman, members of the
18 Board, good morning. Thank you for your time this
19 morning.

20 My name is Mark Bailen. This is my wife
21 Jessica Rosenworcel. We live at 1410 21st Street.
22 Just a few doors down from P Street. Between O and P
23 Street. Right outside or right next to Dupont Circle.

24 We are seeking relief from the FAR
25 limitations in this -- the zoning district essentially

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1 to enable us to reorganize the -- the attic floor
2 space to permit a additional space to permit an
3 additional bedroom.

4 We purchased this house back in 2003,
5 December of 2003, at the end of the year.

6 It's a contributing building in the Dupont
7 Circle historic district and has been featured in the
8 annual Dupont Circle house tour.

9 We've lived in the neighborhood for many
10 years. We lived on O Street when we first moved down
11 here about eight years ago now and we rented
12 apartments in -- on O Street and on P Street and we
13 then bought a condo across the street from our current
14 residence at 1415 21st Street. We love the
15 neighborhood and -- and we really wanted -- we hope to
16 stay there for many more years.

17 This house is a -- a single-family
18 dwelling with an apartment in the basement and also
19 part of the first floor. Technically, it's a flat.

20 The building was renovated we believe
21 between 1977 and 1981, approximately 25 years ago.

22 Christian Zapatka our architect will --
23 will be speaking more about that renovation.

24 But, essentially, the way the building's
25 designed or the townhouse is designed now we have a --

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1 our bedroom is on the third floor and the other
2 bedroom in the unit is on the first floor and we want
3 to create a bedroom in this attic space which would be
4 directly above our bedroom to use as a children's
5 bedroom and we believe that the only way we could
6 feasibly do this is to actually expand this -- this
7 attic space.

8 The alternative, of course, would be to
9 put the children's bedroom in the isolated room on the
10 first floor in the back which is two floors below our
11 current bedroom and we obviously wouldn't be able to
12 care a -- an infant or a young child in that -- in
13 that arrangement.

14 You know, The Washington Post recently
15 highlighted an article on March 10th of last week
16 about young families leaving the District in -- in --
17 in significant numbers. While there's obviously
18 other, you know, people coming into the District, the
19 children -- young families with young children
20 continue to have -- continually are having to leave
21 the District because of various reasons and, you know,
22 we believe that the inflexibility urged by the -- the
23 Office of Planning in this instance sort of
24 disregards these other factors that we think are
25 important for building strong communities and helping

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1 young families in the District thrive.

2 A little more about -- about the -- about
3 the renovation. This addition is not -- is -- in our
4 -- in our view is very minor. It's not going to, you
5 know, cause any detriment to our neighbors.

6 None of them -- actually, you can't see
7 this -- you will not be able to see this at all from
8 the street. The -- nothing is visible from the street
9 and depending on the line of sight, it may not even be
10 visible from the rear apart for some -- from some
11 hotel guests at the Residence Inn which is over eight-
12 stories tall directly to our north and -- and west and
13 perhaps some customers at the bar which is in the
14 alleyway behind our -- our residence.

15 They will probably be the only ones who
16 will be actually -- actually able to see the addition
17 and it will not appear to them as a larger structure
18 since it is -- it is mostly hidden by the existing
19 parapet and it won't cut off anyone's light or air
20 from our neighbors.

21 As a matter of fact, you know, we've
22 received support from all of our neighbors on this.
23 We've spoken to just about everyone on that block
24 between O and P Street the 1400 block about our plans
25 to renovate this property and we -- we discussed in

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1 detail the plans, you know, what we were planning to
2 do and everyone has supported us. We've submitted a
3 petition with several -- numerous signatures from
4 people that we've spoken with.

5 We presented this to the ANC Board and the
6 ANC Commission voted nine to zero in our favor to
7 support this addition and -- and there was even -- one
8 of our neighbors felt strongly enough to actually come
9 down to the ANC meeting to -- to voice his support.

10 So, I think that, you know, in terms of
11 the community support or neighborhood support, that
12 it's clearly there. The -- the structure that we are,
13 you know, asking to be able to build is not going to
14 be taller than our neighbors at 1414, two doors down.

15 They are -- they've done -- they did something
16 similar probably maybe 20 years ago now or 15 years
17 ago and their's would still be -- their height would
18 still exceed what we're planning to do.

19 That's essentially what I need to -- all
20 I need to say I think this morning. If Christian
21 perhaps would add a little about the architectural
22 components which are very significant and I think
23 you'll see from Christian's testimony.

24 MR. GELL: Mr. Chairman, I would just add
25 that the petition that we handed you has some

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1 additional signatures on it. We particularly wanted
2 to get the neighbors on both sides and that -- those
3 do appear on the ones that you have now not the one
4 that were -- were in the package.

5 Christian.

6 CHAIRPERSON GRIFFIS: Good. Excellent.
7 Thank you very much for the opening statement. I
8 think it's very important what you've run across and
9 it isn't lost on this Board, of course, the importance
10 of -- of zoning overall in the city, but also in
11 making a city livable and amenable to everyone. But,
12 especially to new families or growing families that
13 they might stay in the city.

14 I think the reality at times is that we
15 can't control all of those factors and -- and have to
16 start and stop with that which is within the zoning
17 regulations which is obviously why we're here and our
18 -- our point in jurisdiction.

19 Let me ask you very quickly. I think it's
20 excellent the information that you put in in terms of
21 the support of the neighbors and what's critical about
22 that is that it -- it is -- almost in my mind it is
23 almost the -- it -- it's the opposite of concerns that
24 are raised. So, factors of issue might be brought to
25 us by neighbors that say this will block light, air.

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1 The support of the neighbors indicating that there
2 isn't that, I think we can dispense in terms of the
3 negative impact.

4 Very strong special exception case as we
5 -- as you put together, but not variance. So, the
6 quick question that I have for you and perhaps Mr.
7 Zapatka can talk more about this is what -- what is
8 the unique characteristic of your property? Because,
9 of course, the variance test starts with what is the
10 unique aspect of this. Our of that uniqueness there's
11 a practical difficulty in totalling complying with the
12 regulations and then we get into, you know, whether it
13 impairs the public good or the comprehensive plan.

14 If you can answer that, that would be
15 great. My last piece on that and you brought up an
16 excellent point, but I wanted to make sure it was
17 absolutely clarified, that the addition isn't -- you
18 indicated the addition isn't any higher than your
19 neighbors. But, actually, the addition as it's been
20 recorded here is within the allowable height.

21 So, you're building within. As I
22 understand it, you're building within the entire kind
23 of massing areas or on expanding any of the non-
24 conformities that are existing except for that which
25 is the FAR.

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1 MR. BAILEN: Yes, Mr. Chairman, that is
2 correct. We are not exceeding -- we are not asking
3 for any height, you know, exceptions. We're not.

4 And as a matter of fact, we're not, you
5 know, we're not even going as far out of, you know,
6 there's existing -- our existing, you know, structure
7 now is -- is even further out, but we're not -- this
8 addition would not go all the way out to that -- to
9 the end of where the existing structure is now.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. BAILEN: So, we're -- it's clearly
12 within and -- and that was I think my reference before
13 about how this is sort of a minor -- we're not asking
14 for a -- a tremendous addition or something. This is
15 actually a very minor and small addition.

16 As for the uniqueness, I think I'm going
17 to defer to my -- my architect --

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. BAILEN: -- Mr. Zapatka because he can
20 more articulately describe these -- the -- and in fact
21 -- and, in fact, I think the -- the photographs that
22 he will be showing will also be able to speak volumes
23 as to the uniqueness and -- and certainly in a more
24 articulate fashion than I will be able to do. So.

25 CHAIRPERSON GRIFFIS: Okay. Good. Thank

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1 you.

2 Mr. Gell, before he goes on, it seems to
3 my recollection that you cited a court case that
4 talked about the de minimis nature of the relief
5 requested. Am I -- am I correct?

6 MR. GELL: There was a court case that
7 used that language. Yes.

8 CHAIRPERSON GRIFFIS: What was it? It
9 wasn't Gilmartin. Was it?

10 MR. GELL: It might have been. Give me
11 just a moment. I'll find it.

12 CHAIRPERSON GRIFFIS: Gilmartin is the
13 confluence of -- forgive me. I had a high fever all
14 weekend when I was reading this. So, my memory is not
15 going to be perfect. I'm citing these again. What
16 did you find? Confluence of factors is Gilmartin.
17 Indeed.

18 Well, there it is. Why don't we find it
19 for the Board's attention? But, it seems to me it was
20 in here. Either Palmer or Gilmartin. Is it --

21 MR. GELL: I wish I could operate my
22 control F on this, but --

23 CHAIRPERSON GRIFFIS: Yes, indeed.

24 MR. GELL: -- I have to just find the
25 word.

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1 CHAIRPERSON GRIFFIS: Which one was it?

2 MR. GELL: Yes.

3 CHAIRPERSON GRIFFIS: Yes. Okay. Good.

4 It is Gilmartin.

5 MR. GELL: This was -- this was Gilmartin.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. GELL: Right. In a footnote.

8 CHAIRPERSON GRIFFIS: It was on the
9 remand. The BZA may consider whether a variance
10 sought is de minimis in nature or whether for that
11 reason the corresponding lesser burden of proof rests
12 on the intervener. Okay. Footnote six.

13 Let's move ahead then to the exciting
14 stuff.

15 MR. ZAPATKA: Thank you and I'm delighted
16 to have the opportunity to describe what I -- I do
17 think is quite unique about this structure and with
18 that, I'd like to pass out some handouts of
19 photographs. I think the best way to understand the
20 house is to -- to go into it --

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. ZAPATKA: -- and this is the best way
23 I can show it to you.

24 CHAIRPERSON GRIFFIS: Could you have
25 someone hand those up while you keep talking?

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1 MR. ZAPATKA: Yes.

2 CHAIRPERSON GRIFFIS: So we can move this
3 along.

4 MR. ZAPATKA: Give it the secretary.

5 CHAIRPERSON GRIFFIS: Also, can I ask --
6 you're setting those up. Wow. On your sheet A1 that
7 was submitted into the record, it seems to be labeled
8 existing third floor plans. Although one is existing
9 second floor plan. Am I mistaken?

10 MR. ZAPATKA: I don't have it in front of
11 me, but it's quite probably a mistake in labeling.

12 CHAIRPERSON GRIFFIS: Okay. It looks --
13 it looks as though it was. We're just looking at it.
14 So, we just have plans of the third floor and the
15 attic of the fourth floor. Is that correct?

16 MR. ZAPATKA: That is correct. Yes.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. ZAPATKA: The -- that should say --

19 CHAIRPERSON GRIFFIS: That's fine. It's
20 fairly clear.

21 MR. ZAPATKA: -- existing. Yes, it's a --
22 it's a --

23 CHAIRPERSON GRIFFIS: I just wanted to
24 make sure that's exactly what it was and the partial
25 cellar basement level which is the -- which is the

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1 rental unit, that's -- you're -- you're counting that
2 as the first floor. Correct?

3 MR. ZAPATKA: Actually, there's a -- the -
4 - the first floor of the house and its basement are
5 one unit together.

6 CHAIRPERSON GRIFFIS: Right. Okay.

7 MR. ZAPATKA: Right.

8 CHAIRPERSON GRIFFIS: But, just in terms
9 of number of floors when I'm looking at plans, we're
10 at the fourth floor which is actually the attic level
11 or is it --

12 MR. ZAPATKA: Yes, I would -- we're
13 looking at the third floor and then right, an attic or
14 penthouse level is where the addition is.

15 So, there's -- if you look on A3, there's
16 a profile of the house and you see the basement, first
17 floor. Those two are one unit and then second and
18 third floor above are the other unit, the owner's unit
19 and then the vaulted central attic space is the area
20 that we're expanding and see how it pushes back on A4
21 towards the alley at -- at that level only. At the
22 middle of the attic or penthouse level.

23 CHAIRPERSON GRIFFIS: Okay.

24 MR. ZAPATKA: Yes.

25 CHAIRPERSON GRIFFIS: Good.

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1 MR. ZAPATKA: So, right. In -- in terms
2 of uniqueness, I would -- want to just make a -- a
3 couple of general remarks as well as specific to this
4 house. I -- I've been working on quite a number of
5 row house renovations, additions in the District,
6 Georgetown, Dupont, Logan. Really quite a number now.

7 And something that I noticed in almost
8 every case is that either the house is in impeccable
9 kind of original condition, all the original
10 stairwells are in place, the woodwork, the ceiling
11 moldings, doors and windows and so forth. There's --
12 there are a couple of houses, in fact, on this block,
13 there's one at the corner with the rounded front door,
14 and the inside of that is -- is just remarkably
15 intact. So, there -- we -- we see those kind of
16 houses on a number of occasions and it's always a
17 delight.

18 And then in quite a number of other cases
19 really far more, we've seen situations where the --
20 this -- these kind of turn of the century stock, you
21 know, Washington row houses have been really butchered
22 and -- and rebuilt in -- in a very prosaic way with
23 lots of drywall and kind of insensitive planning and
24 really a kind of mean rendition of what people might
25 have thought was appropriate for the house or vaguely

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1 traditional.

2 So, I was quite delighted to discover this
3 house where the -- the front facade is so intact with
4 its Roman brick curved at the bays and really quite a
5 -- a remarkable and again, a contributing structure to
6 the block and then to go inside and -- and have the
7 surprise of this kind of soaring open space with a --
8 a lot of volume emphasized and I guess what I would
9 want to say specifically is in looking at this house
10 over the past several months and -- and working with
11 Mark and Jessica on how to gain the additional space
12 they need in the form of a bedroom, I sort of
13 certainly withheld my typical tendencies to kind of
14 start over because I think what's here is really
15 rather unique and I would argue that it's a very good
16 example of -- of late 1970s, early 1980s.

17 This work was done by an architect named
18 Thomas Burke-Simmons whose address is in Washington,
19 D.C. in southeast. It's not an architect I'm familiar
20 with, but I think it's quite clear that the work he
21 did here in the original set of blueprints that I've
22 been working from and these photographs, very clear
23 that he had a -- had a design in mind and this was not
24 a kind of run of the mill developer job where it was
25 all, you know, as I said in other cases cleared out

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1 and then rebuilt in a very ordinary way, but indeed a
2 statement.

3
4 And I think you can see from the
5 photographs that the -- the emphasis in this case was
6 to open the house up as much as possible, give a sense
7 of great volume and light. The skylight at the top is
8 the beginning of or is that existing portion of the
9 penthouse and indeed from there moving backwards would
10 be the proposed addition we would be suggesting.

11 I also -- just trying to place it even
12 historically, I mean I think something also to -- to
13 keep in mind is it's -- it's important that we
14 preserve our -- our 19th century heritage, but I think
15 there's some good examples of the 20th century, too,
16 that we should, you know, respect and take care of
17 and, in fact, there's a -- a movement to preserve mid-
18 century Modernism.

19 This is kind of late Modernism and the
20 best thing I could compare it to would be the work of
21 the so-called New York Five architects that any
22 architect on the Board would be familiar with, Peter
23 Eisenman, Michael Graves, Charles Gwathmey, John
24 Hejduk, and Richard Meier and in flipping through this
25 book that was produced for an exhibit at the Museum of

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1 Modern Art in 1972, it's -- it's really uncanny the
2 similarities in some of the -- the work.

3 You see the -- the kind of bow front
4 landing of a staircase and ship rails that Richard
5 Meier was particularly fond of. Of course, all of
6 this was coming out of an interest in the work of the
7 French architect Le Corbusier, but these kind of very
8 plastic white smooth surfaces. The ship's rails that
9 you see in the stairs here. All of that is clearly
10 indicative of an architect, a local Washington
11 architect who was very influenced by what was
12 happening in his period in the late '70s.

13 And so, I -- I would argue that the house
14 is extremely unique not from the sense of a -- in its
15 volume or setbacks or size, but its design and the
16 fact that there's this turn of the century brownstone
17 that has this incredible late Modernist interior in it
18 and I think it would be a terrible shame to lose it.

19 And really the -- the only way to gain
20 practical space internally would indeed be to
21 disassemble it and -- and start over and then, of
22 course, to provide a -- a comparably good conventional
23 layout for such a house would be exorbitantly
24 expensive. According to my calculations at least
25 three times the cost of our relatively modest proposal

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1 for expanding the penthouse into an extra bedroom
2 above closer to the parents' bedroom.

3 And also giving a little bit more -- just
4 on an architectural level a little bit more of a
5 destination for this incredible stair that rises up to
6 the penthouse. Right now, you just arrive at a
7 landing and that's it. Whereas, in our proposal, you
8 would turn back on the -- the sequence towards the
9 alley and find that final room.

10 So, again, I would reiterate that based on
11 the photographs in front of you and the description of
12 a -- a very studied and -- and well-designed creation
13 of a Modernist interior, I think it would be not only
14 a shame to lose such an example here in Washington
15 where we really don't have enough good examples of
16 modern architect and -- and -- and also in terms of
17 uniqueness. Prohibitively expensive to -- to take
18 that apart and attempt a -- a conventional layout for
19 the house.

20 Yes, just right to reiterate, the -- what
21 -- what I said earlier. The -- the penthouse above is
22 in -- in the order of 100,000 -- 100 plus in terms of
23 expenses as we're getting quotes back.

24 Re-configuring the -- the third floor
25 altogether -- the -- the second and third floor

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altogether would be at least three times that and I guess one other thing to -- to point out is that on that third floor there's a -- a kind of balcony or mezzanine that goes back to the -- the only outdoor space that Mark and Jessica have access to. So, that -- that also if we attempted to put in a narrow room there, it would immediately block off the public access to that space and building over the open stairwell would -- would destroy the -- the house as well as eliminate the head clearance required there.

So, I think that's, yes, everything I'd like to say about it.

CHAIRPERSON GRIFFIS: Good. Thank you very much.

MR. ZAPATKA: Yes, indeed.

CHAIRPERSON GRIFFIS: Quite a walk through of architectural history brief as it may be and invoking the New York Five is always fascinating.

Any questions on that? No. Good.

Well, moving on then, let me ask you somewhat seriously if you -- if you're looking at this as something as a -- a takeoff of the Modernist movement and certainly Meier with its colors and its swooping shapes as are utilized in the building, how is the Modernist family suppose to live? I mean

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1 wasn't this part of the whole package?

2 MR. ZAPATKA: That's -- that -- that's
3 always a good question and when Peter Eisenman was
4 asked in an interview well, your buildings are so
5 unstable. He said well, it's suppose to represent the
6 zeitgeist of our time and the reporter asked him where
7 do you live and he said I live in an 18th century
8 cottage in Princeton.

9 CHAIRPERSON GRIFFIS: Exactly. Beautiful.
10 Okay. Well, we won't go too far down that direction.

11 Specific on this, there -- I have some
12 question in -- in looking at this again going to plans
13 and section. You talked about there's a small
14 balcony, outside space, which I can see from the
15 photographs. I'm not sure I'm reading these plans
16 correctly looking at -- or maybe I am. I'm having a
17 difficult time. It looks as though on the existing
18 third floor there's actually an enclosed space towards
19 the -- the very far edge. Because there's a window
20 showing in the existing. Are you looking at what I
21 am? Right.

22 So, if you look at the top one, there's
23 actually glazing that looks like there's in an
24 opening. On the bottom one, not.

25 MR. ZAPATKA: This -- yes, those -- those

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1 are handrails.

2 CHAIRPERSON GRIFFIS: Microphone.

3 MR. ZAPATKA: Those are handrails within
4 masonry --

5 CHAIRPERSON GRIFFIS: Okay. So, if you --
6 if you look at the section then, you walk on the
7 second floor. You're walking out. Why am I looking
8 at what seems to be some fenestration there? Is that
9 an interior space on the very left side?

10 MR. BAILEN: No, the -- I'm sorry. You're
11 talking on the top floor there?

12 CHAIRPERSON GRIFFIS: Any of the floors.
13 What is that whole back? It looks --

14 MR. BAILEN: It -- it's a -- the -- the
15 top floor is an open deck. It has -- it has some
16 brick structure on it though, but it is open. There's
17 no roof.

18 CHAIRPERSON GRIFFIS: Right. It's in --
19 it's -- yes, it has a side enclosure.

20 MR. BAILEN: Yes, well, it's --

21 CHAIRPERSON GRIFFIS: So, what's below it?

22 MR. BAILEN: Below it is a kitchen. It is
23 -- is a room.

24 CHAIRPERSON GRIFFIS: So, the kitchen --
25 the section is just not cutting through that area. Is

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1 that correct?

2 MR. ZAPATKA: That is correct.

3 CHAIRPERSON GRIFFIS: Okay.

4 MR. ZAPATKA: Yes.

5 CHAIRPERSON GRIFFIS: So, on the first
6 floor, what's that room then not cut in the section?

7 MR. BAILEN: The first floor is a room
8 that's part of the basement unit. The basement unit
9 has both floor space in the basement and on the first
10 floor.

11 CHAIRPERSON GRIFFIS: I see.

12 MR. BAILEN: We have one room on the first
13 floor. It's a -- you can imagine it is almost like a
14 -- like a interlocking system where you have the
15 basement and the top unit kind of come together in L
16 shapes. Although it's not even an L shape. It's
17 almost like a -- an H where the top of the -- the --
18 the -- the top unit comes down and the -- the bottom
19 unit has a -- a room in the front of the building and
20 a -- and a room in the rear of the building and then
21 we have the --

22 CHAIRPERSON GRIFFIS: All right. So, they
23 have a communicating stair somewhere from the basement
24 level to the first floor for their portion.

25 MR. BAILEN: Right.

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1 CHAIRPERSON GRIFFIS: Okay. So, where is
2 your kitchen and main living area?

3 MR. BAILEN: On the second floor. There's
4 a kitchen, living room, and dining room and that's --

5 CHAIRPERSON GRIFFIS: So, the photograph
6 that I'm looking at which is -- well, this photograph.

7 MR. BAILEN: Right.

8 CHAIRPERSON GRIFFIS: What floor is that?

9 MR. BAILEN: The -- here. I'll take this.

10 MR. GELL: Mr. Chairman --

11 MR. PARKER: We have a model that might be
12 helpful.

13 MR. GELL: -- there's some confusion and -
14 - and if you look on page A1, these are both the third
15 floor. One's the existing. One's proposed.

16 CHAIRPERSON GRIFFIS: No, and that's what
17 I figured. That's what I'm trying to get a handle on
18 like what the second floor is.

19 MR. BAILEN: This is -- this is the second
20 floor here.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. BAILEN: There's a fireplace.

23 CHAIRPERSON GRIFFIS: Okay. That's makes
24 sense.

25 MR. BAILEN: A living room. This is the

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1 dining area right here and then the kitchen is here.

2 CHAIRPERSON GRIFFIS: Here. Have a seat
3 and just put it right on the table. That may show it.

4 So, this represents actually the section
5 drawing that's submitted and that's what I'm saying is
6 that that back portion wasn't cut through on the
7 section.

8 So, what happens back there? Because even
9 on the plans, it's not showing anything.

10 So, you're living space --

11 MR. BAILEN: This is incorrect here. This
12 is actually open. This is open.

13 CHAIRPERSON GRIFFIS: Right. Right.
14 Right. That's the top floor which is your outside
15 balcony.

16 MR. BAILEN: Right.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. ZAPATKA: This -- the top level is the
19 outside balcony.

20 CHAIRPERSON GRIFFIS: Okay.

21 MR. ZAPATKA: The next level with the
22 round windows the kitchen and the photograph in the
23 handout, you can see through that --

24 CHAIRPERSON GRIFFIS: I see.

25 MR. ZAPATKA: -- opening and then --

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1 CHAIRPERSON GRIFFIS: And what's in that
2 room with the round window?

3 MR. ZAPATKA: That's the kitchen.

4
5 CHAIRPERSON GRIFFIS: Aside from the dog
6 dishes.

7 MR. ZAPATKA: That's the kitchen which is
8 directly under the roof terrace.

9 CHAIRPERSON GRIFFIS: Oh, my. Okay. And
10 that's on the second floor. Second level.

11 MR. ZAPATKA: That's right. It's right
12 here.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. ZAPATKA: In fact, it's probably
15 better not to have this.

16 CHAIRPERSON GRIFFIS: No, don't -- don't
17 worry about that.

18 MR. ZAPATKA: No, it's a working model.
19 We, too, are still grappling with the volume metrics
20 of this --

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. ZAPATKA: -- extraordinary structure.

23 CHAIRPERSON GRIFFIS: So, the first floor
24 and the basement.

25 MR. ZAPATKA: Roof, terrace, kitchen and

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1 then these are --

2 MR. BAILEN: Right. It's actually a loft
3 space in the basement unit.

4 CHAIRPERSON GRIFFIS: It's a double height
5 in the basement.

6 MR. BAILEN: Right. Well, it's -- there's
7 a -- there's a loft space in there. So, there is --

8 CHAIRPERSON GRIFFIS: Gotcha.

9 MR. BAILEN: -- there is a room above it,
10 but it's --

11 CHAIRPERSON GRIFFIS: How did you
12 calculate the FAR for that space?

13 MR. BAILEN: It's included in. It's all
14 included.

15 MR. ZAPATKA: That -- that question did
16 come up at one point about does a -- does a loft or
17 mezzanine --

18 CHAIRPERSON GRIFFIS: Does it cover more
19 than a third of the floor below it?

20 MR. GELL: It doesn't -- it doesn't
21 matter. As I read the regulations, it may not count
22 as a story.

23 CHAIRPERSON GRIFFIS: No, it won't count
24 as a story.

25 MR. GELL: But, it does count in GFA.

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1 CHAIRPERSON GRIFFIS: Oh, I suppose
2 mezzanines do. That's true.

3 MR. ZAPATKA: And then this shows -- say
4 this is what's there currently.

5
6 CHAIRPERSON GRIFFIS: Right.

7 MR. ZAPATKA: And this is the extension
8 for this additional room?

9 CHAIRPERSON GRIFFIS: Oh, boy.

10 MR. ZAPATKA: Okay.

11 CHAIRPERSON GRIFFIS: Well, I'm clear. Is
12 everyone clear on what we're actually looking at?
13 Fine and, you know, you have to submit your book into
14 the record of the New York Five. So, we can have some
15 good reading at lunch. Okay.

16 MR. ZAPATKA: It's a signed copy.

17 CHAIRPERSON GRIFFIS: Even more important
18 that we get it. All right. Any other questions?

19 Have you looked at taking over the unit in
20 the basement?

21 MR. BAILEN: Yes, I can speak to that.
22 Yes, as a matter of fact, we -- we did explore, you
23 know, what other options we could do and it -- it --
24 and it turned out that that would be very tricky as
25 well and -- and then probably cost prohibitive.

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1 The way it works is -- I mean we could if
2 we -- if we took over the entire unit obviously, but
3 then we would lose the benefit of having the rental
4 income which was a contributing factor to the -- our
5 ability to actually purchase the -- the townhouse back
6 in 2003 to begin with, but if -- if we were to try to
7 at least take over -- we -- we've explored taking over
8 that space that you were just referring to underneath
9 the kitchen and bringing that into our unit and that
10 way, we would -- we would just reduce the size of the
11 lower unit and yet, enhance the size of our unit and
12 that was -- it was very difficult to do because the
13 way it's designed is our unit has -- the bedroom on
14 the first floor in our unit sort of dissects the --
15 the lower unit. So --

16 CHAIRPERSON GRIFFIS: Right.

17 MR. BAILEN: -- in order to take over that
18 bedroom, we could, but then it would just be an extent
19 -- it would be like a railroad room because it would
20 just be an extension of the existing bedroom that we
21 had and that really didn't -- that wasn't really
22 feasible I mean.

23 CHAIRPERSON GRIFFIS: I see.

24 MR. BAILEN: And it -- it -- in -- in
25 terms of taking over the front room in the -- in the

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1 -- in the unit because there's a room in the front in
2 the downstairs unit, their entryway is in that -- is
3 in the same -- we -- we both enter the front door and
4 then there are two doors --

5 CHAIRPERSON GRIFFIS: Two doors.

6
7 MR. BAILEN: -- that -- that go off.

8 CHAIRPERSON GRIFFIS: Right.

9 MR. BAILEN: If we took over their front
10 room, they would then have no way to enter.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. BAILEN: And there is a -- there is a
13 little storage space beneath the stairwell, our front
14 stairwell, where we store, you know, the trash
15 receptacles.

16 CHAIRPERSON GRIFFIS: So, I understand
17 from what you're saying and also in the -- the written
18 submissions that it would -- it would also be a fairly
19 monumental reconfiguration and construction project,
20 one, to move your kitchen down from the second floor
21 to animate the second level as bedrooms. Move it to
22 the first level. Remove the unit. Outside of the
23 financial loss that you'd have not having the unit --

24 MR. BAILEN: Right.

25 CHAIRPERSON GRIFFIS: -- it's a -- a

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1 fairly complicated construction project.

2 MR. BAILEN: That is correct. I mean the
3 -- Christian --

4 CHAIRPERSON GRIFFIS: Let me ask then on
5 -- in terms of this --

6 MR. BAILEN: -- spoke about the cost.

7
8 CHAIRPERSON GRIFFIS: -- the FAR
9 calculations, you calculated the entire floor as if it
10 was carrying through because it has that monumental
11 stair that rises through it and then the small kind of
12 walkway or mezzanine walkway on each of the floors.
13 Is that -- is that correct? Can you calculate the FAR
14 or did someone else?

15 MR. ZAPATKA: Actually, my -- my assistant
16 Phillip did and I -- I believe we were calculating
17 based on the -- what floor surface was there. So, we
18 didn't double, you know, anything.

19 CHAIRPERSON GRIFFIS: But, you counted the
20 stair at every level?

21 MR. ZAPATKA: I believe so.

22 CHAIRPERSON GRIFFIS: You got to be up
23 here. Just tell Mr. Zapatka yes/no.

24 MR. ZAPATKA: The -- the stair was counted
25 once. Right. So, the -- the -- the footprint of the

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1 stair was counted once going all the way through.

2 CHAIRPERSON GRIFFIS: You mean it's
3 counted on every level?

4 MR. ZAPATKA: Okay. So, on each level,
5 floor area minus stairway plus the area of the stair
6 once. Because it doesn't -- it -- it only -- it only
7 occupies a floor plate one time.

8 CHAIRPERSON GRIFFIS: How does the Office
9 of Planning calculate the FAR?

10 MR. PARKER: Yes, we hadn't gotten into
11 this. We count the area of the stair on each floor.

12 CHAIRPERSON GRIFFIS: Right. I think it's
13 pretty clear. Because then the gross floor area, and
14 the definition of which I'll pick up here, the gross
15 floor area determination shall include basements,
16 elevator shafts, stairwells at each story. Floor
17 space used for mechanical -- so, essentially, the
18 stairwell even though it's -- it's communicating
19 between the two levels, it counts as a solid and
20 counts towards the floor area ratio because it's
21 obviously part of the gross floor area.

22 My point of it is this. In terms of --
23 and we've had now a lot of talk about the uniqueness
24 and actually, the uniqueness is the architectural
25 design and configuration of the interior.

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1 If you look at it, there's another aspect
2 to the uniqueness that I'm starting to see with these
3 photographs. Is sure you have this big stair. That
4 doesn't bother me because you're going to have a stair
5 going up no matter what. Maybe a little bit smaller,
6 but what's interesting is that the whole volume in the
7 center is somewhat removed to open it up all the way
8 through. Although it starts to calculate towards the
9 FAR because you're counting that stair which allows
10 for this openness all the way through the levels, but
11 it counts toward gross floor area.

12 Then you have that communicating kind of
13 little mezzanine walkway across that connects the back
14 and the front. I mean traditionally these townhouses
15 had -- it did. It had somewhat of a railroad floor
16 plan if -- if I can assume, but obviously, there would
17 be one or two or two or three rooms on each level.

18 So, actually, the -- the -- it's almost as
19 if the -- the -- the utilizable, if that's a word,
20 square footage in this was removed for the design
21 aesthetic or the -- or the design configuration under
22 the same volume and massing as the building itself.
23 Does that make sense?

24 So, basically, you're -- you know, these
25 Modernists, I don't know what they were on, but

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1 nonetheless, thought that this was this great new
2 thing that actually got less usable space. Does that
3 make sense?

4 MR. ZAPATKA: It does and actually, in
5 listening to your description, I'm also thinking in a
6 way it's -- it might be thought of as an -- an
7 internal version of the -- the ubiquitous light court,
8 but it's brought internally.

9 CHAIRPERSON GRIFFIS: Yes, I -- you know,
10 it's in my limited understanding that Modernist light
11 played an awful large part in how it transfers and
12 actually defines spaces and the different utilization
13 of spaces. Would make sense in looking at this.

14 How often does Office of Planning see that
15 as a basis of uniqueness and practical difficulty?
16 Well, we'll get to that point, but nonetheless, any
17 other questions from the Board? Clarifications?

18 Mr. Gell, is there anything further in the
19 case presentation at this time?

20 MR. GELL: I -- I think I understand what
21 you're saying that it operates --

22 CHAIRPERSON GRIFFIS: Good. Because
23 somebody ought to.

24 MR. GELL: -- that the stairway operates
25 somewhat -- I'm sorry.

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1 CHAIRPERSON GRIFFIS: Yes, I'm sorry. Go
2 ahead.

3 MR. GELL: That the stairway operates
4 somewhat as an atrium. It has an atrium affect.

5 CHAIRPERSON GRIFFIS: Right.

6 MR. GELL: But, you have to count it as
7 you would not count an atrium.

8 CHAIRPERSON GRIFFIS: Right. Yes,
9 exactly. I think that -- that is very articulated,
10 that is, Mr. Gell and Mr. Zapatka.

11 So, for the Board's understanding, if you
12 had, for instance, a commercial office building, it
13 had a large atrium and, you know, you walk in. You
14 can look up eight stories. It would count at the
15 gross floor area or the floor area ratio then
16 calculated at one level because you don't have floors
17 are the way through.

18 The minute you put a stairway as this is
19 and that small area way, the minute you put that into
20 the opening that goes all the way up, it's not
21 necessarily usable, but it's now counting at every
22 floor. So, at four levels of it, it's four times the
23 gross floor area of -- as opposed to an atrium which
24 would just be once. Good. All right. An interesting
25 point.

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1 MR. ZAPATKA: Yes, just following up on
2 that. It -- this -- this -- the design of this stair
3 with it's switchback and curved landings, in fact,
4 takes up a lot more room than the conventional side
5 stair in a row house would.

6 CHAIRPERSON GRIFFIS: Right. This is
7 substantially larger than -- how wide is this house?
8 It is 18? I mean is it fairly standard row dwelling?

9 MR. ZAPATKA: It's -- I believe it's about
10 18.

11 CHAIRPERSON GRIFFIS: It looks like it.

12 MR. ZAPATKA: Seventeen and a half.

13 CHAIRPERSON GRIFFIS: Right. So, it's 18
14 lot or, you know, whatever it is. Yes, that was --
15 okay.

16 MR. ZAPATKA: Um-hum.

17 CHAIRPERSON GRIFFIS: Interesting. All
18 right. Anything else, Mr. Gell? Ms. Miller,
19 question?

20 VICE CHAIRPERSON MILLER: I have a
21 question for Mr. Gell when he gets back.

22 MR. GELL: Yes, Ms. Miller.

23 VICE CHAIRPERSON MILLER: Before -- before
24 we move to Office of Planning, I'm wondering if you
25 can address the practical difficulty argument that --

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1 that you're making in this case. I mean I stepped out
2 for a minute when you referenced the Gilmartin case to
3 go get my variances cases and I know that Office of
4 Planning doesn't see the practical difficulty in this
5 case and so, I'd like to hear your view in addition to
6 having read what you wrote in your papers.

7
8 MR. GELL: Very well, I -- I was going to
9 wait until Mr. Parker's testimony to really show the
10 difference between the way we look at this and the way
11 the Office of Planning does, but --

12 VICE CHAIRPERSON MILLER: We can do that.

13 MR. GELL: -- if you like I can --

14 VICE CHAIRPERSON MILLER: Want to do that?

15 CHAIRPERSON GRIFFIS: No.

16 VICE CHAIRPERSON MILLER: Okay.

17 MR. GELL: -- I can go into it.

18 VICE CHAIRPERSON MILLER: No, just if you
19 can address it just briefly.

20 MR. GELL: Well, we have the two tests,
21 uniqueness and practical difficulty and I'm not quite
22 sure if the Office of Planning recognizes the
23 uniqueness. They kind of say no, but at the same
24 time, they say that the interior design is notable and
25 worthy of retention.

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1 On page four, they also say re-configuring
2 the design to accommodate a bedroom in the interior of
3 the unit would severely compromise the architecture.

4 Now, that strikes me as -- as going to the
5 basis of both uniqueness and practical difficulty, but
6 they -- they really don't explain why they don't
7 regard the case as having been made.

8 They state that the layout with one
9 bedroom on the third floor and one on the first floor
10 is not conducive to a family with very young children,
11 but then they seem to say well, that doesn't matter.
12 Personal concerns of -- of a family have nothing to do
13 with practical difficulty. Well, I suggest that they
14 really -- they really do.

15 VICE CHAIRPERSON MILLER: That kind of
16 goes to my question. The practical difficulties,
17 doesn't that go to complying with the regulations and
18 where does it say in the regulations that the -- this
19 property needs to accommodate a family?

20 MR. GELL: Well, it -- it doesn't say that
21 in so many words in the regulations, but what the
22 cases say as they interpret the law, and the
23 regulations really ought to follow the -- the law as
24 interpreted by the courts, is that there's a balancing
25 act. That you're really looking at the burden on the

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1 owner of having to use the property without getting
2 the variance as opposed to getting the variance
3 compared to what affect it has on the zone plan, what
4 affect it has on neighborhoods and so forth.

5 So, it's this -- now, I don't think that's
6 necessarily the test for a use variance, but for an
7 area variance where the cases specifically say there's
8 a lesser standard, there I believe that they're --
9 they're saying that there should this reference both
10 to the burden and to -- to the necessity to the owner
11 and there are cases in which the BZA and indeed the
12 Office of Planning have looked at the needs of the --
13 of the families.

14 I have some cases I can cite and quote to
15 you where they specifically go into that. Say Wesley
16 Heights case where they allowed somebody to tear down
17 a small building to build a bigger one because the
18 family needed more room. They had a couple of
19 children and wanted more. So, the family needed more
20 room and that justified getting a zoning variance to
21 build a larger house than would otherwise be
22 permitted.

23 VICE CHAIRPERSON MILLER: What case is
24 that? Is that a BZA case or a court of appeals case?

25 MR. GELL: BZA.

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1 VICE CHAIRPERSON MILLER: Do you remember
2 what it is?

3 MR. GELL: Yes, it's 17245, 5144 Cathedral
4 Avenue, N.W., Kuck C-U -- K-U-C-K, Jeff and Sharon
5 Kuck. It was just decided last November.

6 I have copies if you'd like to see.

7 VICE CHAIRPERSON MILLER: Yes, I don't
8 know.

9 MR. GELL: What -- what I'm giving you is
10 the -- is -- is the Office of Planning's report where
11 they go into this. Now, the BZA also approved the
12 case and I -- I don't have a copy of the case I don't
13 believe, but the BZA did approve it.

14 CHAIRPERSON GRIFFIS: What is that?
15 That's a case that you're -- so, this is going to
16 establish that OP reports have precedential value?

17 MR. GELL: Well, it's going to establish
18 that OP reports aren't necessarily consistent.

19 CHAIRPERSON GRIFFIS: Nor should they be
20 as each application is unique, but go ahead.

21 MR. GELL: We're -- we're -- you know,
22 we're told about the integrity of -- of the zoning
23 regulations and again, Mr. Parker can speak to this,
24 but he and I have had some conversations. I
25 understand their thinking and that is that they simply

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1 will not under any conditions recommend a variance in
2 these kinds of cases when, in fact, they did.

3 VICE CHAIRPERSON MILLER: Mr. Gell, maybe
4 you can respond to something else. Because I think
5 we're all -- I think we are very sympathetic to
6 accommodating families in the District, but I mean our
7 job is to meet all three prongs of that variance test
8 and so, I'm still stuck on this practical difficulties
9 test and I want to give you the opportunity to -- to
10 address it.

11 You cited the Gilmartin case and I was
12 skimming through it and I -- and just skimming through
13 it, you know, there may be different paragraphs later
14 on, but there's one paragraph in which the court cites
15 the Myrick case and it says, in paren, the cost of
16 renovation of interior space insufficient to justify
17 area variance where expansion of living space could be
18 achieved in accordance with regulations. On the other
19 hand, 1700 block indicates that at some point economic
20 harm becomes sufficient at least when coupled with a
21 significant limitation on the utility of the
22 structure.

23 So, I mean where I -- where I see this
24 case at this point is people have been living in this
25 property since the renovations for 25 years at least.

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1 So, what's the limitation on the utility? It's --
2 it's that it can't be used for a family versus a
3 couple or -- is that -- is that what your argument is?

4 MR. GELL: Certainly, a couple could --
5 could live in -- in the building until they decide to
6 have children, but that has -- it seems to me if you
7 look back over BZA cases, very often the question
8 isn't even asked about what whether you really need
9 the -- the space for your own family. It's just you
10 want it. Does it have a -- a serious effect? Does --
11 is -- is the condition of the property, not just the
12 condition of land, we can get to that in a minute as
13 well, but the condition of the property such that
14 you're not able to get sufficient use of the property?

15 CHAIRPERSON GRIFFIS: Well, there's --
16 there's another important -- Ms. Miller, another
17 important aspect that you just read in terms of the
18 Myrick case and that indicated that the -- that the
19 economic issue couldn't be -- isn't strong if the
20 expansion of the interior could be done within
21 conformance of the regulations. Isn't the case in
22 point here that the expansion can't be done based on
23 the fact that there's no place to do it?

24 If you enclose on the third level that
25 area, put a room over it. That's now your outside

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1 terrace. Doesn't that invoke the same variance that
2 you're looking for now?

3 MR. GELL: You'd be adding FAR. Is that
4 -- is that your point?

5 CHAIRPERSON GRIFFIS: Right.

6 MR. GELL: Yes.

7 CHAIRPERSON GRIFFIS: And I think we've
8 walked through the fact of where else would you put a
9 bedroom. Right? The second level -- I'm looking at
10 the second level. You could convert your kitchen, but
11 then the kitchen's got to go somewhere.

12 So, you go -- you keep walking up. I mean
13 isn't the point if I understand the application
14 correction, there is no place in the interior to tuck
15 a bedroom.

16 MR. GELL: Not -- I think that's been the
17 testimony and even if you can try to force a bedroom
18 somewhere on the first floor, you're still two floor
19 below the -- where the parents would be sleeping and
20 that's -- that's not going to be conducive.

21 CHAIRPERSON GRIFFIS: Right.

22 MR. GELL: In the Myrick case, I think
23 there was no testimony there that they couldn't get
24 full use of the property without the variance.

25 Here we do have testimony and that is

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1 we've shown not only uniqueness, but a practical
2 difficulty created by the renovation which I -- which
3 I think makes this quite different from most of the
4 cases that come before you.

5 However, we also have the other issue and
6 that is that this lot had it -- before it -- it was
7 truncated, before it was shortened, probably would
8 have sustained the FAR that we're seeking, but it had
9 been shortened in order to allow some townhouses on
10 the other -- on the side on O Street to have access to
11 garages behind them.

12 Now, you might say well, but that -- that
13 was done by a previous owner. It didn't have to be
14 done, but the fact is the District government
15 permitted it to happen. Normally, they will not do
16 that. They will not allow you to create a lot that is
17 nonconforming without some BZA relief.

18 CHAIRPERSON GRIFFIS: Right.

19 MR. GELL: So, you know, the --

20 CHAIRPERSON GRIFFIS: What portion -- you
21 -- you put in the -- the plat. What portion are we
22 looking at that was actually sold to the adjacent
23 property? Is it the area --

24 MR. GELL: It's -- it's the part that says
25 North 1750. That whole area where it says asphalt,

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1 concrete North 1750.

2 CHAIRPERSON GRIFFIS: Um-hum. That whole
3 portion?

4 MR. GELL: That's right.

5 CHAIRPERSON GRIFFIS: So, how -- how does
6 the applicant get access to the alley?

7 MR. BAILEN: Hello. Technically, we -- we
8 -- we'd have to cross over the -- our neighbors
9 property, but there is no direct access to the alley.
10 That's -- that's open space there.

11 CHAIRPERSON GRIFFIS: Wow. That was a
12 tough subdivision or transfer of property. So, how do
13 you? You don't?

14 MR. BAILEN: Technically, you know, the
15 times that we've, you know, gone back there was yes,
16 we -- I suppose we're -- we're going over -- we don't
17 have any easement or anything like that. So --

18 CHAIRPERSON GRIFFIS: You don't have an
19 easement?

20 MR. BAILEN: -- we're coming over --

21 CHAIRPERSON GRIFFIS: No -- no,
22 understanding at all? Do you have trash pickup out
23 front?

24 MR. BAILEN: We have trash pickup out
25 front and there is a gate. I think you can even see

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1 it on this where the letter G is.

2 CHAIRPERSON GRIFFIS: Right.

3 MR. BAILEN: Right above 848. There is a
4 gate there. We seldom use it, but it is -- it is
5 there. It's -- actually, the -- it's -- the basement
6 unit has a door. It has a sliding glass door that
7 goes right out to that space there. It's really --

8

9 CHAIRPERSON GRIFFIS: I see.

10 MR. BAILEN: -- that space in the back is
11 really used by the basement unit.

12 CHAIRPERSON GRIFFIS: That's fascinating.

13 So, Mr. Gell, you're saying that that should also
14 factor into the uniqueness and practical difficulty in
15 terms of I guess somewhat the zoning history, but also
16 the -- more of the -- the uniqueness of the history of
17 the existing structure and the existing lot.

18 MR. GELL: Yes, I would. I -- I -- look
19 we could make the argument just based on it, but we
20 think we have a much stronger argument because we have
21 this -- the whole other issue of the architectural
22 significance.

23 CHAIRPERSON GRIFFIS: Right. Right.
24 Getting to the confluence of factors and the whole
25 aspect.

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1 MR. GELL: And -- and the cases do say
2 that you can -- that the factors can be from a variety
3 of sources and they need not be tied to the land in
4 fact.

5 CHAIRPERSON GRIFFIS: Sure. Sure. No,
6 and that's understanding and the Board has entertained
7 that several times previously. I don't think we have
8 difficulty in doing that. It's just digesting that
9 which is presented whether it actually rises to the --
10 to the level of actually meeting the test whether
11 together, separately or however it is presented.

12 This is an R-5-B zone. Is it not?

13 MR. GELL: Yes. That's right.

14 CHAIRPERSON GRIFFIS: Is it not the
15 highest residential density zone in the District?

16 MR. GELL: Well, you have R-5-B and D and
17 so forth.

18 CHAIRPERSON GRIFFIS: Yes. Yes. Okay.
19 So, it's getting there though. It's certainly
20 ratcheting up.

21 MR. GELL: It's -- it's certainly -- it's
22 certainly in the fives.

23 CHAIRPERSON GRIFFIS: Right. I mean it's
24 the highest in the R-5.

25 MR. GELL: And you could put an apartment

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1 building on that site if you could meet the FAR.

2 CHAIRPERSON GRIFFIS: That's -- it's
3 interesting. So, here it is that the zone district
4 allows high density for the District of Columbia, high
5 density residential.

6 MR. GELL: That is correct.

7 CHAIRPERSON GRIFFIS: I see. Okay. But,
8 based on the diminished size I mean whatever the
9 reason was to lose that back portion, you've lost
10 obviously a large area that the FAR would be
11 calculated from which has actually diminished the FAR
12 allowable on the now current property.

13 MR. GELL: That's correct and -- and I --
14 again, I return to the language unnecessarily
15 burdensome.

16 CHAIRPERSON GRIFFIS: Right.

17 MR. GELL: Which -- you know, which gives
18 you I think a good deal of -- of wiggle room for want
19 of a better term. I think it -- it can be -- it can
20 be a subjective decision based on a variety of factors
21 that would support this practical difficulty.

22 CHAIRPERSON GRIFFIS: Good. Okay. Enough
23 of this bantering. Let's go right to --

24 MR. GELL: And also I -- I -- I might add
25 that the --

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1 VICE CHAIRPERSON MILLER: Wait --

2 MR. GELL: -- the addition is of such
3 modest size that that too can be taken into account in
4 calculating the unnecessarily burdensome nature of it.

5 VICE CHAIRPERSON MILLER: That -- I have
6 two questions. That was my first one.

7 Are you making the argument that it's de
8 minimis, the variance that you're requesting?

9
10 MR. GELL: I -- I -- I don't know whether
11 I could testify to whether something is de minimis or
12 not.

13 CHAIRPERSON GRIFFIS: No, what's your
14 legal -- your legal opinion?

15 MR. GELL: I don't -- I don't -- I think
16 de minimis in the --

17 CHAIRPERSON GRIFFIS: You cited the court
18 case.

19 MR. GELL: I'm sorry.

20 CHAIRPERSON GRIFFIS: I think Ms. Miller
21 is asking your legal opinion as you've cited the court
22 case that establishes de minimis which would reduce
23 the test or the threshold for the test compliance.

24 MR. GELL: Well --

25 CHAIRPERSON GRIFFIS: In your reading of

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1 that, is this a de minimis application?

2 MR. GELL: I -- I don't think that it has
3 to be shown to be this de -- I could argue yes, it's
4 de minimis, but I don't even think that the test has
5 to be that it can only be permitted if it is de
6 minimis.

7 CHAIRPERSON GRIFFIS: Right.

8 MR. GELL: I mean de minimis kind of
9 sounds to me like it has absolutely no -- no substance
10 whatsoever. That the human eye would -- would have a
11 hard time even -- even -- even noticing it. They are
12 expanding the attic. There's no -- no question about
13 it.

14 Now, it's not -- not going to be seen by
15 anyone and maybe the affect on the neighborhood would
16 -- could be considered to be de minimis, but I don't
17 think that Gilmartin necessarily says that that's the
18 only test you can apply.

19 CHAIRPERSON GRIFFIS: No, it's not the
20 only, but we ought to -- if you're -- if you're
21 proposing what I understand --

22 MR. GELL: Or that it has to reach that
23 level of de minimis to -- in order to -- to get the
24 practical difficulty.

25 CHAIRPERSON GRIFFIS: Of course, the

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1 counter argument to that is how could this be de
2 minimis? It's asking for a .79 variance in the FAR
3 and a 1.8 FAR allowable. You're moving it upwards of
4 two and a half, more than two and half, almost 2.6 --

5 MR. GELL: That's correct.

6 CHAIRPERSON GRIFFIS: -- at a 1.8
7 allowable.

8 MR. GELL: And -- and I'm not sure what --
9 you know, if -- if -- if the measurements necessarily
10 are even going to justify the 2.59. What do you
11 think?

12 CHAIRPERSON GRIFFIS: You mean you're
13 going to ask for more?

14 MR. GELL: What we're asking for is -- is
15 what the plans show and I think if the BZA permits the
16 variance to go through that that's what the zoning
17 administrator will -- will look at, but the precise --
18 whether -- whether we're precisely at 2.59 at this
19 point having heard this testimony that they didn't
20 take into account the stairs at each level, I'm not
21 sure if -- if we're right at 2.59.

22 CHAIRPERSON GRIFFIS: Okay.

23 VICE CHAIRPERSON MILLER: Okay. I have
24 one more question on this analysis with respect to the
25 practice difficulty.

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1 Is it correct that the needs of these
2 owners could be accommodated with respect to growing
3 their family by using the basement that's presently
4 being rented out?

5 MR. GELL: As I understood Mr. Bailen,
6 they'd have to move. They have to sell the house and
7 move into -- into a house that's more conducive to
8 that kind of living arrangement.

9 VICE CHAIRPERSON MILLER: I guess my
10 question goes to is it the cost of not renting out the
11 basement or is it the cost of accommodating the
12 structure to use the basement that's the factor?

13 MR. GELL: I'll let Mr. Bailen answer
14 that.

15 MR. BAILEN: Yes, it's actually both. The
16 cost to -- to reconfigure the house to make it livable
17 by using the space in the -- in the basement would be
18 prohibitive. As -- as Mr. Griffis, you know, alluded
19 to before, we -- you know, the kitchen is now on the
20 second level and in order to -- to redo the house, we
21 would have to bring the kitchen down to make it on the
22 first level I suppose and then put the bedrooms -- you
23 know, move bedrooms up to the second level. It would
24 -- it would -- we'd have to probably just gut the
25 entire place, make it -- you know, carve it out --

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1 carve a shell out of it and then just start over from
2 scratch.

3 VICE CHAIRPERSON MILLER: Thank you.

4 MEMBER ETHERLY: Mr. Chair, just to be
5 sure I've resolved clearly the question of the -- of
6 the stair, the conversation that we had was that the
7 floor area was taken for -- for all of the floors and
8 then the stairs were added once at the end and I just
9 want to make sure I'm clear what was added at the end
10 was just the floor area for the stair on one level or
11 was the floor area from the stair to each of the
12 levels added in one lump sum at the end?

13 MR. ZAPATKA: Just one level.

14 MEMBER ETHERLY: Okay. Thank you. Thank
15 you, Mr. Chair.

16 CHAIRPERSON GRIFFIS: Good. Last thing, I
17 don't know if you have it or not, but do you have the
18 total FAR of the building that was calculated? No,
19 however they calculated it --

20 MR. GELL: The figure that -- that I got
21 was 2.59.

22 CHAIRPERSON GRIFFIS: But, actually, a
23 square footage number.

24 MR. GELL: I -- I may have it. It's
25 probably on the -- on the --

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1 CHAIRPERSON GRIFFIS: Is it in this --

2 MR. GELL: -- certification sheet.

3 CHAIRPERSON GRIFFIS: Does anyone have
4 that in front of them? I don't know if it matters.
5 We can move on with it. Let's --

6 MR. GELL: No, I'm sorry. We just give
7 the percentage --

8 CHAIRPERSON GRIFFIS: Yes. Yes,
9 percentage.

10 MR. GELL: -- number.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. GELL: We could provide that
13 information if --

14 CHAIRPERSON GRIFFIS: No, I don't think
15 it's needed. I mean it just -- it seems to me looking
16 at this -- well, there it is. My quick calculation is
17 that allowable 1.8 FAR would be about 2,110 square
18 feet and if you look at this in terms of the floor --
19 first floor is probably 1100. You're looking at two
20 story or one and a half story building allowable on
21 1.8. Now, that's totally inaccurate in terms of its
22 preciseness, but it would be interesting to know maybe
23 what 1.8 actually allows, but well, let's move on.

24 Okay. What else? Anything else? Ready
25 for Mr. Parker?

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1 MR. GELL: I may have some other -- some
2 other points to make after --

3 CHAIRPERSON GRIFFIS: Of course. We'll
4 return to you, of course, afterwards for summation --

5 MR. GELL: That's fine.

6 CHAIRPERSON GRIFFIS: -- and conclusions.
7 So, let's go to the Office of Planning then. It's
8 well awaited report.

9 MR. PARKER: Good morning, Mr. Chairman
10 and members of the Board.

11 CHAIRPERSON GRIFFIS: Good morning.

12 MR. PARKER: Before I give my report, I'd
13 like to respond to one remark you made a moment ago
14 about the R-5-B District. I think for the purposes of
15 the comprehensive plan map, R-5-B falls in the
16 moderate density category and doesn't even rise to the
17 medium density much less the high.

18 CHAIRPERSON GRIFFIS: All right.
19 Moderate. De minimis. All right. Okay. Go ahead.

20 MR. PARKER: Thank you.

21 CHAIRPERSON GRIFFIS: It's certainly
22 higher than R-3. Right?

23 MR. PARKER: Certainly, but actually
24 within the same density category.

25 CHAIRPERSON GRIFFIS: Indeed.

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1 MR. PARKER: This case is clearly a
2 difficult one for -- for us to decide. I've had
3 multiple conversations with Mr. Gell and the
4 applicants.

5 We understand that there does not appear
6 and is not a negative affect of this proposed addition
7 on the neighbors. That -- that it will not be visible
8 from any direction.

9 Also, in my report, we did concede that
10 there is -- this -- the architecture in this building
11 is unique. The interior design of this building is --
12 is different from most other structures that you'll
13 find and it is worthy of preservation on the interior
14 of this building.

15 The difficulty that my office has had and
16 that I've discussed multiple times with the applicant
17 and in my report is the uniqueness and practical
18 difficulty that results in requiring an extra bedroom.

19 We would completely agree that there would be a
20 practical difficulty to adding a -- an additional
21 bedroom or two additional bedrooms in this existing
22 home. The -- what we have been looking for is a
23 practical difficulty justifying an additional bedroom
24 at all and that's what -- I -- I think what my office
25 is still looking for a uniqueness resulting in a

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1 practical difficulty to adding bedrooms to this
2 existing home.

3 And the applicant makes the argument that
4 -- that there is a family situation where -- where
5 certain families should be permitted to live as -- the
6 problem that the office has with that is how do we
7 define a family? Where do we -- where do we cut off
8 the line? What -- what does rise to the level of
9 justification for a variance and what does not? And
10 we're hesitant to start drawing that line on our own.

11 We do not -- as I said before, we do not
12 necessarily see any harm to the public good in this
13 variance, but section 2001.3 does specifically
14 prohibit additions to nonconforming structures. This
15 is a nonconforming structure. So, we'd need a strong
16 uniqueness and practical difficulty in our opinion to
17 recommend in favor of this variance and as of right
18 now, we haven't found a uniqueness and practical
19 difficulty that would result in the need to add a
20 bedroom to this home.

21 As far as the history of the lot, the --
22 to the best of my research, the -- the condominiums
23 behind were built around the same time that the
24 renovations were done this house in 1979. At that
25 time, property was evidently sold to the condominium

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1 and when the previous property owner sold that
2 property, they also sold rights to the FAR
3 calculations from the property that was given to the
4 condominium units.

5 Making an argument that additional FAR
6 should be allowed on this building based on the
7 property that was sold in 1979 doesn't make sense to
8 -- to OP and we don't think that argument necessarily
9 is relevant to this case. We think the relevant
10 arguments are the unique architecture and -- and the
11 arguments that -- that the first half of our
12 discussion today have focused on and we know the Board
13 will have a difficult decision to make in front of
14 them.

15 Happy to answer any questions.

16 CHAIRPERSON GRIFFIS: Excellent. Thank
17 you very much and I think the Board understands your
18 position and -- and well, understands it.

19 I think it's -- it's very articulate first
20 of all looking at, as you've corrected me, but the
21 moderate density as that relates to the comprehensive
22 plan. Obviously, that's one of the parts of the
23 analysis that you're looking to and also, that's going
24 directly to the aspect of look is 2.6 FAR accommodated
25 in your -- in your looking at it, in our looking at

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1 the R-5-B or is it actually going into a higher or
2 less restrictive zone category. Also, in terms of the
3 Dupont Circle district which you've indicated in your
4 report should be -- its integrity should be a
5 consideration of the Board.

6 I think you're absolutely right also in
7 looking at the FAR and the selling off of part of the
8 property. It is difficult for -- for my analysis in
9 looking at that. That would be some sort of, one,
10 uniqueness, but, two, practical difficulty in that it
11 was -- it was something that was possibly incorrectly
12 done. But, was done with deliberation and, therefore,
13 the FAR of the surrounding area has not changed in
14 mass, but has transferred to a different property.
15 So, how could that be a basis of this application?

16 But, then -- well, let me open it up to
17 others for questions. Mr. Etherly.

18 MEMBER ETHERLY: Thank you very much, Mr.
19 Chair. I -- I definitely want to applaud the Office
20 of Planning's report because I think -- I -- I thought
21 it was well thought out considering as Mr. Parker
22 alluded to the -- the challenge, the obvious challenge
23 of this case and perhaps a very strong desire to be
24 sympathetic.

25 Let me ask a question about the earlier

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1 sale of a portion of the lot to the condo. Because
2 part of my concern is I understand on the one hand not
3 necessarily relying on that sale as grounds or
4 rationale for finding some uniqueness in the property,
5 but at the same time by virtue of identifying and --
6 and I'm not necessarily sure if this is a question for
7 you, Mr. Parker, so, I'll give you the option to
8 respond.

9 But, essentially what I'm -- what I'm kind
10 of getting at is even though the Office of Planning is
11 perhaps suggesting that that not be taken into
12 consideration as -- as a rationale for uniqueness just
13 by nature of the fact that the lot is now
14 nonconforming already in three distinct categories,
15 isn't that implicitly taken into consideration what
16 happened some years ago?

17 The spirit of my question is getting at,
18 you know, I'm -- I mean some of the arguments that Mr.
19 Gell is laying out are somewhat compelling to me when
20 taken in their totality, but I want to just kind of
21 peruse some of the Office of Planning's concerns and
22 that aspect of taking into account the earlier sale of
23 the portion of the property is somewhat problematic,
24 but I'm not sure if it's a killer.

25 Fell free to respond or not or I would

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1 even maybe encourage some of my colleagues to help me
2 kind of understand that.

3 CHAIRPERSON GRIFFIS: Well, as I
4 understand, the question is --

5 MEMBER ETHERLY: Why not take that earlier
6 -- that earlier --

7 CHAIRPERSON GRIFFIS: Right.

8 MEMBER ETHERLY: -- transaction into
9 consideration because that is what treated -- that is
10 what created the nonconformity on those three counts.

11 Would the Office of Planning's position be
12 different is those existing non-conformities were not
13 in place?

14 MR. PARKER: Supposing that something was
15 done incorrectly 20 years ago/25 years ago that
16 created a nonconforming situation, that makes the
17 existing situation legal and I'm sure the Board has no
18 problem with anything that is in the exiting envelope
19 of the building that was created by that situation.

20 I don't believe that that provides any
21 justification for going further and creating a larger
22 building than what existed when that process was done.

23 Even if the original lot would have
24 allowed this addition, as -- as the Chairman
25 mentioned, that FAR possibility, that extra lot area

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1 was sold away and was built elsewhere.

2 So, I think it's difficult to argue that
3 because this lot was once larger we should allow a
4 building that would fit on a lot that existed 25 years
5 ago.

6 MEMBER ETHERLY: Okay. Thank you. Thank
7 you, Mr. Chair.

8 CHAIRPERSON GRIFFIS: Ms. Miller.

9 VICE CHAIRPERSON MILLER: Mr. Travis, with
10 respect to -- Parker, with respect to the variance
11 test, I just want to make sure I understand where --
12 where you are and Office of Planning is. With respect
13 to uniqueness, it sounds like that you recognize that
14 this is unique with respect to at least its
15 architecture and internal layout. Is that right?

16 MR. PARKER: Yes, the exterior building is
17 clearly not unique on the block. It's the size and
18 shape and form of the others, but as far as the
19 interior design of the building, that appears to be
20 unique. I clearly haven't been in any of the other
21 buildings, but I don't believe that they were all
22 renovated in this fashion.

23 VICE CHAIRPERSON MILLER: Okay. And then
24 -- and then going to the next step then, would you
25 also say that the uniqueness of the layout leads to a

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1 practical difficulty for the owner to accommodate a
2 family or no?

3 MR. PARKER: That's -- that's debatable,
4 but I would -- I would support -- I would say that I
5 would have a difficult time, yes, if I was in the --
6 in the applicant's position raising children in that.

7 VICE CHAIRPERSON MILLER: So, then is the
8 question merely then is this the type of practical
9 difficulty that rises to the level of granting a
10 variance?

11 MR. PARKER: No, I think it's -- is it a
12 -- the applicant is stating a practical difficulty to
13 raising a family. The --

14 VICE CHAIRPERSON MILLER: No, the -- I
15 think the applicant is stating a practical difficulty
16 to accommodating this property for the needs of a
17 family without making the change requested.

18 MR. PARKER: But, the zoning ordinance
19 doesn't address the needs of raising a family.

20 VICE CHAIRPERSON MILLER: No, but the
21 zoning ordinance addresses a practical difficulty and
22 so, that's my question is -- is Office of Planning of
23 the view that they're not sure or they don't think
24 that this rises to the level of practical difficulty
25 as it's been interpreted, you know, by the courts --

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1 MR. PARKER: That's an interesting
2 question. Yes, we had a difficult time determining
3 what personal situations arise to the level of
4 practical difficulty when you're talking about bearing
5 the standards of the regulations and where that comes
6 into play and where we draw that line and we, I guess,
7 are of the opinion that it's the Board's discretion to
8 draw that line and not ours.

9 VICE CHAIRPERSON MILLER: Okay. Thank
10 you.

11 CHAIRPERSON GRIFFIS: So, the important
12 aspect that you just said was it was the Board's
13 discretion to draw that line if I -- okay. I did hear
14 that correctly.

15 Very well. Let's move ahead. Mr. Gell,
16 unless there's any other questions of the Board of the
17 Office of Planning, Mr. Gell, any cross examination of
18 the Office of Planning?

19 MR. GELL: Yes, thank you. The words in
20 the statute extraordinary or exceptional situation or
21 condition, now wouldn't that define the situation Mr.
22 Etherly alluded to which is that we have a smaller
23 lot, that something has happened back in 1980 that
24 created a smaller lot that made this property unable
25 to do what its next door neighbors could do which is

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1 build much larger buildings?

2 MR. PARKER: The next door neighbors to
3 the south all of them are in the same situation I
4 believe. I think all of them lost the same property
5 and are in the same boat and allowing this situation
6 would provide justification for the next-door
7 neighbors to do the same.

8 MR. GELL: Well, I -- I can't say that I
9 know the precise history of that property although I
10 did live there back in 1959. Yes, back in 1959 when I
11 recall --

12 CHAIRPERSON GRIFFIS: But, the point is if
13 I understand --

14 MR. GELL: -- but those lots were smaller.
15 They've always been smaller. Yes, I -- I have some -
16 -

17 CHAIRPERSON GRIFFIS: Right.

18 MR. GELL: -- I have some old maps here --

19 CHAIRPERSON GRIFFIS: Okay.

20 MR. GELL: -- that I'd be glad to show
21 you.

22 MR. ZAPATKA: When I first looked at base
23 maps, the applicant --

24 CHAIRPERSON GRIFFIS: Okay. But, we're at
25 cross. So, we just need questions of OP. Not

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1 testimony, Mr. Gell.

2 MR. PARKER: Well, I mean even if this --
3 this was the only lot to lose property, if in the past
4 it had been the size of the lots to the north and now
5 it's the size of the lots to the south, either way, it
6 doesn't create a -- a lot that's unique in this
7 neighborhood much less in this city --

8 CHAIRPERSON GRIFFIS: Right. So --

9 MR. PARKER: -- in and of itself.

10 CHAIRPERSON GRIFFIS: -- if we rephrase
11 the question, the question came a 1400 square foot lot
12 in an R-5-B is that unique on its face?

13 MR. PARKER: Not on its face.

14 CHAIRPERSON GRIFFIS: Okay.

15 MR. GELL: You cite 2001.3 as saying that
16 you can't increase in size a building that's
17 nonconforming, but isn't that the whole idea behind a
18 variance and didn't we ask for a specific variance
19 from the provision?

20 So, I wonder, Mr. Parker, if you're
21 confusing zoning regulation requirements with the
22 tests for a variance. If possible. I, you know.

23 MR. PARKER: Right. No, and you're
24 correct. You did ask for a variance from that
25 section. No, I -- I understand that your variance

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1 tests are meant to address both of those variances,
2 the FAR and the additions to nonconforming structures.
3 Absolutely.

4 MR. GELL: All right. Well, I think I can
5 -- I can let it go at that. I think most of the
6 statements have already been made that we would want
7 the Board to -- to know and -- and particularly the
8 one that Mr. Parker ended up with which is that it --
9 that OP doesn't feel it can draw the line, but -- but
10 the BZA might and I do -- I do have a case in which,
11 in fact, OP was --

12 CHAIRPERSON GRIFFIS: Save that for
13 closing, Mr. Gell.

14 MR. GELL: I'd be glad to, sir. I'm
15 sorry.

16 CHAIRPERSON GRIFFIS: Do you want to save
17 that for closing or do you have other questions of
18 Office of Planning?

19 MR. GELL: I don't have any further
20 questions. No.

21 CHAIRPERSON GRIFFIS: Okay. Is the ANC --
22 I haven't noted or asked. Is the ANC represented
23 today? ANC-2B. I had figured not seeing them in
24 here.

25 Ms. Miller, question?

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1 VICE CHAIRPERSON MILLER: I just have one
2 more question which basically, I think that you stated
3 that your alternative to accommodate the property
4 would be to do something with the basement and that
5 would be prohibitive and I'm just wondering if you can
6 be a little bit more specific. Do you have any idea
7 of ballpark what -- what that would cost?

8 CHAIRPERSON GRIFFIS: Well, the --

9 VICE CHAIRPERSON MILLER: Or do we --

10 CHAIRPERSON GRIFFIS: -- this is perhaps
11 the third time we're going to go through this. I
12 don't know if it's the cost that we're actually
13 looking at because we don't have any cost comparisons
14 outside of 100,000 to put this up which isn't going to
15 be a meaningful value of comparison and contrast and I
16 mean think about the impact if I understand the
17 testimony correctly.

18 It is -- it's removing all of the plumbing
19 and the electric and all of that because it's
20 separately metered if I recall correctly in the record
21 that was submitted. You're removing all that. You're
22 removing it off of a second floor. You're moving it
23 all down.

24 It is in my limited capacity of
25 understanding these things, looks to be a major

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1 renovation if not a gut renovation of all floors that
2 are impacted. So, we're talking about basement,
3 first, and second floor.

4 VICE CHAIRPERSON MILLER: Okay.

5 CHAIRPERSON GRIFFIS: Does that about do
6 it?

7 MR. BAILEN: Yes, that is correct.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. BAILEN: And I think the -- the
10 stairway that goes -- that we've been discussing would
11 present the -- the initial problem of being -- I would
12 have to tear down the stairway and rebuild that to be
13 able to sort of accommodate the -- a room -- you know,
14 putting the rooms -- you know, putting it back into
15 its original form and I think that alone is -- is from
16 -- you know, and we've had people -- we've had, you
17 know, contractors come in to -- to discuss our options
18 with us and one of the things they said was we're not
19 touching that stairway.

20 CHAIRPERSON GRIFFIS: Right.

21 VICE CHAIRPERSON MILLER: Okay. Okay.

22 CHAIRPERSON GRIFFIS: Not for its
23 architectural uniqueness, but just from --

24 MR. BAILEN: Right. From a -- from a
25 practical standpoint.

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CHAIRPERSON GRIFFIS: We didn't even put that on the record. Okay. What? Good.

All right. Last question then. The stairway, does it -- it goes all the way to basement? This is monumental. It's doesn't communicate --

MR. BAILEN: No.

CHAIRPERSON GRIFFIS: -- from the first floor to the basement level.

MR. BAILEN: No, it does not. The -- the stairway just goes from the first floor to the second floor where you see right there --

CHAIRPERSON GRIFFIS: Exactly.

MR. BAILEN: -- is the second floor and then goes to the third floor. The -- the basement stairway is a separate stairway in the separate unit.

It's -- it's --

CHAIRPERSON GRIFFIS: Right.

MR. BAILEN: -- completely different.

CHAIRPERSON GRIFFIS: Right. Okay. Okay. Good. All right. Anything further? Good.

Let's move on to the ANC report. I did ask if the ANC-2B was represented. I didn't see any indication of such and still do not.

Exhibit Number 23. It was timely filed and it's been now a while since I looked at it since

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1 this morning. However, they are in support of the
2 application and it does meet all the tests to be
3 granted great weight by the Board. Unless, Mr. Gell,
4 you have any other comments on the ANC or questions
5 from the Board.

6 MR. GELL: No. Yes, as -- as you know, it
7 was unanimous.

8 CHAIRPERSON GRIFFIS: Indeed. Nine to
9 zero. Okay. And one neighbor came down to testify in
10 support if I recall correctly. The testimony that we
11 started out with.

12 That being said, let's move ahead. Are
13 there any people present today, persons to provide
14 testimony either in support of Application 17291, in
15 opposition to 17291. Not noting any indication of
16 persons present to provide testimony.

17 Mr. Gell, let's turn it over to you for
18 any sort of closing submission, remarks that you might
19 have.

20 MR. GELL: Yes, thank you, Mr. Chairman.
21 In Case Number 17245, the Office of Planning which Mr.
22 Parker represents as not being able to take into
23 account family need said the following: "The addition
24 of two children to the applicant's family since the
25 existing house was purchased five years ago has

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1 increased the applicant's need for more living space.

2 The family desire to remain at the same location, but
3 the existing house, one story, is too small to
4 accommodate a growing family. The applicant proposes
5 to raze the existing house and replace it with a
6 larger two-story dwelling with basement. It's a
7 rationale solution for addressing the family's need
8 for more living space short of moving to another
9 location."

10 I don't know how much more clearly the
11 Office of Planning could state that it really believes
12 that the need of a family and here we're not asking
13 for a third or fourth bedroom. We're only asking for
14 a second bedroom so that there can be a child not an
15 extraordinarily large family and we think under those
16 conditions that the BZA can find that -- that the
17 regulations applied to this case is unnecessarily
18 burdensome to the family who's -- who can satisfy its
19 needs by in a very modest way increasing the size of
20 the attic.

21 Most everything else has already been
22 presented. I won't go over it. So, thank you.

23 CHAIRPERSON GRIFFIS: Good. Thank you
24 very much, Mr. Gell.

25 Just for total clarification, that report

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1 that you were just citing was the report that you
2 submitted into the record. Is that correct?

3 MR. GELL: Yes, that is correct.

4 CHAIRPERSON GRIFFIS: And it was the Kuck
5 or the Cluck or what was the family name?

6 MR. GELL: That was Kuck.

7 CHAIRPERSON GRIFFIS: Right. Indeed.

8 MR. GELL: K-U-C-K.

9 CHAIRPERSON GRIFFIS: If I remember that
10 correctly, it had a -- it had a -- the lot dimension
11 was -- the minimum lot dimension wasn't met and it was
12 nonconforming in that. So, they needed the variance
13 from they. They also needed a variance from the rear
14 yard based on the confirmation of the house. I mean
15 it's a very small lot and trying to put actually a
16 house in there.

17 I guess my point is -- is that I
18 understand the rationale and certainly OP did speak
19 substantially on the fact of, you know, the -- the
20 instant family that was looking to build that house,
21 but I think it was in more general aspect in keeping
22 with the residential nature and making it usable for a
23 residential house.

24 If you -- if you -- I believe in that
25 report if I recall correctly, there was a little shack

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1 there. I mean it certainly wasn't even close to be
2 accommodating.

3 MR. GELL: I don't mean to say that the
4 case is exactly the same as ours.

5 CHAIRPERSON GRIFFIS: Right.

6 MR. GELL: The only reason I -- I cite it
7 is that OP does indeed look --

8 CHAIRPERSON GRIFFIS: Address --

9 MR. GELL: -- at those issues.

10 CHAIRPERSON GRIFFIS: -- family needs --

11

12 MR. GELL: And --

13 CHAIRPERSON GRIFFIS: -- and residential
14 needs.

15 MR. GELL: -- and doesn't consider them
16 irrelevant.

17 CHAIRPERSON GRIFFIS: Okay. Okay. I
18 don't think we're that far off in terms of my thought
19 and even in -- with OP's current position of this
20 which I think is an appropriate one for Office of
21 Planning to hold. I mean they -- they are going to be
22 -- well, I won't say that.

23 Let's move ahead. Any other last
24 questions from the Board? If not, we are running out
25 of time and we'll need to move on.

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1 So, I'd entertain any sort of direction
2 that we can go on this.

3 Very well. I think the record is complete
4 on this. We've heard an awful lot. This is -- it's
5 fascinating. Actually, a fascinating case and a bit
6 complicated, but let's move ahead. I think the
7 Board's prepared to rule on this today.

8 MEMBER ETHERLY: Mr. Chair, I would like
9 to move approval of Application Number 17291 pursuant
10 to 11 DCMR 3103.2 for variances from the floor area
11 ratio requirement under section 402 and nonconforming
12 structure provisions under section 2001.3 at premises
13 1410 21st Street, N.W. and would invite a second.

14 CHAIRPERSON GRIFFIS: It's seconded.

15 MEMBER ETHERLY: Thank you very much, Mr.
16 Chair. If I'd like -- Mr. Chair, I'd like to kind of
17 begin the deliberation and then wholeheartedly invite
18 other colleagues to -- to weigh in.

19 I think I want to start with the Office of
20 Planning report because as I said during our
21 discussion of that report, I think it was a very
22 excellent report that did very well to highlight the
23 difficulties in terms of reconciling zoning regs to an
24 extent although I'm -- I'm going to kind of talk
25 through a little bit of how I think that

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1 reconciliation has been satisfactorily made by virtue
2 of the applicant's argument through counsel, but I --
3 I just want to appreciate and acknowledge the
4 difficulty that I think the Office of Planning found
5 itself in in terms of looking at the language of the
6 relevant structures of the relevant zoning regulations
7 here.

8 I think with respect to the issue of -- of
9 the uniqueness of the property, I'm going to speak a
10 little bit to -- to what I thought was -- was quite a
11 creative and compelling case with regard to the
12 architecture of the structure and how that
13 architecture plays into the type of structure that we
14 -- that the applicants kind of find themselves in.

15 I believe it has been satisfactorily
16 demonstrated that this structure is indeed an asset in
17 the -- in the Dupont Circle community as has been
18 indicated by the property's presence on the Dupont
19 Circle Tour for a number of years running if I recall
20 from -- from testimony and I think once again the
21 Office of Planning noted that and understood that in
22 terms of -- in terms of its -- its review of the
23 property here.

24 But, I believe the arguments that were put
25 forth by the applicant, and -- and pulling the

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1 applicant's statement in front of me, I think were --
2 were very helpful here.

3 As was noted by Mr. Gell in his opening
4 statement, the Clerics of St. Viator, Inc. case did
5 talk about the issue of factors or events extraneous
6 to the land at issue being viewed or being appropriate
7 for analysis from the standpoint of looking at the
8 uniqueness of a particular property and I think we do,
9 indeed, see a situation here where there is a -- there
10 is an extraneous aspect that being perhaps the
11 architectural nature of the interior of the property
12 that is at work here.

13 And additionally, as you look at a
14 confluence of factors as we talked a little bit under
15 the Gilmartin case, I think a little bit of that
16 zoning history is somewhat helpful in terms of looking
17 here. I would not necessarily suggest that I'm
18 resting the uniqueness component on that zoning piece,
19 but I think once again as you look at the confluence
20 of factors here, I think that is something that is
21 somewhat of interest to me in terms of the history of
22 this particular property. So, I just wanted to
23 highlight those two particular issues under the issue
24 of uniqueness.

25 As we begin to move towards the issue of

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1 extraordinary or exceptional physical condition
2 creating the practical difficulty, I think it was very
3 helpful in the applicant's submittal that under the
4 Palmer case there is no need to show undue hardship,
5 but only that strict compliance would be unnecessarily
6 burdensome.

7 And I think here in combination with that
8 third prong of the variance test that gets to the
9 issue of no adverse impacts and in particular
10 adherence or substantial detriment and particularly to
11 the zoning regulations. I think it is here where we
12 begin to take into account the circumstances that --
13 that are extant with regard to this particular case.

14 Chief amongst with -- chief amongst which
15 is a family endeavoring to continue making productive
16 use of its property and doing that within the
17 boundaries of the District of Columbia.

18 I would hate to find a -- a set of
19 circumstances where strict adherence to the zoning
20 regulations would necessarily compel any family, not
21 necessarily simply the applicant, but any family to
22 have to give consideration to leaving what is
23 otherwise an enjoyable and very productive use of --
24 of -- of their current property. I just find that a
25 little disconcerting.

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1 I -- once again, I'm going to bend over
2 backwards to -- to highlight the excellent work of the
3 Office of Planning here because I think the Office of
4 Planning's position is not -- is not an unreasonable
5 one that when you look at the strict language of the
6 zoning regulations there has to be perhaps some, if
7 you will, cutoff point, but I think Mr. Parker said it
8 best when he said it would be for the Board of Zoning
9 Adjustment to perhaps make that determination as to
10 how far it might be willing to go with regard to
11 questions of these types.

12 But, I think when we look at the issue of
13 strict compliance here, I think there is an
14 unnecessary burden that is being dealt with in as Mr.
15 -- as counsel for the applicant Mr. Gell indicated in
16 a rather de minimis way. I am very -- very swayed by
17 the language in Palmer that was offered, I'm sorry, by
18 the language in Gilmartin that was offered by the
19 applicant's counsel with respect to footnote number
20 six. In particular, referencing that the BZA may
21 consider whether the variance sought is de minimis in
22 nature and whether for that reason, a correspondingly
23 lessor burden of proof rests on the intervener
24 according -- from footnote six.

25 I'm not suggesting that there's a lesser

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1 standard of proof here that needs to be met, but I
2 think when you look at the -- at the relief that's
3 being sought and what this applicant is -- is
4 attempting to do with the property, based on the ANC's
5 support, based on the submittal of signature petitions
6 which include adjacent property owners, I think we
7 have a very strong case that at least as it relates to
8 the impact of the proposed project on the surrounding
9 community and -- and from the ANC's standpoint there's
10 a very clear sense that -- that there's not a level of
11 severity here that would raise concern with respect to
12 the variances that are requested and the overall
13 impact of the variance on -- on the zone plan.

14 Let me stop right there, Mr. Chairman. I
15 want to take a deep breath because I've talked for
16 about five minutes straight, but I'm happy to submit
17 the motion and -- and would continue to encourage the
18 support of my colleagues. Thank you.

19 CHAIRPERSON GRIFFIS: Good. Thank you
20 very much. I think you have adequately touched on the
21 uniqueness. That being the interior design which has
22 been as you say celebrated by the Dupont Circle
23 community.

24 Whether you like it or not, it's a factor
25 of what has been done and it is to a level of which is

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1 different than what one might say -- more, I think,
2 the terminology was developer or contractor type
3 reconfiguration of the house.

4 Based on that uniqueness, there is a
5 practical difficulty in terms of converting it.
6 Again, whether you wanted to hold the design or not,
7 the fact of removing the systems and that which is in
8 place in the stair to -- to add on a more
9 accommodating bedroom numbers which would actually be
10 more analogous to the adjacent townhouses or to
11 similar townhouses, certainly, it would be well within
12 the allowable use of the -- of the zoning.

13 The other aspect of concern to raise is
14 the -- the fact of we've -- we've gone back and forth
15 on what the actual FAR is and, therefore, what the
16 actual extent of the relief is.

17 I would proposed, Mr. Etherly, if it's
18 appropriate with you and your motion, that we would,
19 if continue with this, look to the drawings as the
20 level of which we are in discussion allowing some
21 flexibility as to the exact calculations for the FAR,
22 but the massing would not be anticipated to be changed
23 at all.

24 MEMBER ETHERLY: No objection, Mr. Chair.

25 CHAIRPERSON GRIFFIS: Good. Then let's

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1 let it -- I'll let it go at that and have others speak
2 to the motion.

3 VICE CHAIRPERSON MILLER: I would just
4 like to address the variance tests. With respect to
5 uniqueness which is the first prong, I don't think
6 there's any question, Office of Planning has supported
7 it as well, that this property is unique with respect
8 to its layout and that that uniqueness does lead to a
9 practical difficulty upon the owner to accommodate the
10 structure for a family.

11 And so, I think the question was that I
12 raised, that I've been grappling with, is that the
13 type of practical difficulty that's recognized in our
14 ordinance for granting a variance and so, I want to
15 say that first of all, I think at one point I may have
16 been -- we need to separate a use variance and a area
17 variance.

18 This is an area variance and in a use
19 variance, it may be appropriate to consider whether
20 other owners could use the home who didn't have an
21 interest in raising a family, but that's not the
22 question here. So, I want to set that aside.

23 And then the -- the way the regulation
24 reads is that it would result in peculiar and
25 exceptional practical difficulty upon the owner of

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1 such property and I think that the case has been made
2 that there is a practical -- that there is a practical
3 difficulty placed upon the owner in this case and that
4 is that of accommodating the structure to accommodate
5 a family and we did explore alternatives and the
6 alternatives as -- as was presented in the evidence
7 were prohibitive. So, basically, there is no other
8 alternative that's realistic.

9 So, I think that the case has been made
10 for a practical difficulty upon the owner.

11 And then the third prong that it leads to
12 is no substantial detriment and we certainly have
13 evidence in the record that there's no adverse impact
14 on neighbors. We have the support of the neighbors.
15 We have no neighbors opposing. We have the support of
16 the ANC.

17 We don't have any indication that the
18 structure's appearance with respect to the expansion
19 is causing any adverse impact and, in fact, I think
20 there's evidence to the contrary that it's in the
21 public interest, that it would further the policy of
22 encouraging families to stay within the District which
23 is a District policy.

24 And -- and I think when we look at these
25 cases, we can't say that just because somebody wants

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1 to do an expansion that -- that the tests have been
2 met or they can't have trouble meeting the expansion.

3 If they -- if they want to do an expansion, you still
4 -- it's the third test and if there's -- if there's a
5 substantial detriment, you don't grant it or if
6 there's a practical difficulty or if there's not, they
7 can do it another way, whatever.

8 But, I think that in this case that all
9 three prongs have been met.

10 CHAIRPERSON GRIFFIS: Excellent. Thank
11 you very much. Others?

12 If there's nothing else from the Board,
13 then we do have a motion before us. It has been
14 seconded. I'd ask for all those in favor signify by
15 saying aye.

16 (Ayes)

17 CHAIRPERSON GRIFFIS: And opposed?
18 Abstaining? Mr. Moy.

19 MR. MOY: Yes, sir, the staff would record
20 the vote as 4-0-1. This is on the motion of Mr.
21 Etherly to approve the application. Seconded by Mr.
22 Griffis, the Chair. Also in support of the
23 application, Mr. Mann and Ms. Miller and we have no
24 Zoning Commission member participating.

25 CHAIRPERSON GRIFFIS: Good. Thank you

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1 very much. We also have no party in opposition on
2 this.

3 I suggest if it's not objection of the
4 Board members that we use a summary order on this
5 case.

6 MEMBER ETHERLY: No objection.

7 CHAIRPERSON GRIFFIS: And we can waive our
8 rules and regulations and move ahead.

9 Mr. Moy, is that appropriate?

10 MR. MOY: Yes, sir.

11 CHAIRPERSON GRIFFIS: Excellent. Very
12 well. Thank you all very much. We appreciate taking
13 time to get through all of this and the detail.

14 The Board's going to take just a quick
15 five-minute break and then we'll call the last case
16 from the morning.

17 (Whereupon, at 11:37 a.m. off the record
18 until 11:47 a.m.)

19 MR. MOY: Yes, sir, the next and last case
20 for the morning session is Application Number 17264 of
21 Michael and Jill Murphy pursuant to 11 DCMR 3103.2 for
22 a variance from the lot occupancy requirements under
23 section 403 and a variance from the rear yard
24 requirements under section 404 to construct a deck at
25 the rear of a single-family row dwelling in the CAP C-

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1 A-P/R-4 District at premises 407 E Street, N.W.
2 That's in Square 812, Lot 42.

3 And the only other thing that the staff
4 would like to add is that there is a request for party
5 status, Mr. Chairman.

6 CHAIRPERSON GRIFFIS: Good. Thank you
7 very much. We do have Mr. -- Mrs. Nejad here.
8 Present. Okay.

9 Any questions from the Board? We do have
10 full application in -- in front of us and also one
11 assumes a majority of their case presentation. Is
12 there any questions at this time?

13 Does the applicant -- if you wouldn't mind
14 introducing yourself for the record with your name and
15 address.

16 You just need to touch the base there.
17 Turn on the light. Perfect.

18 MR. MURPHY: My name is Michael Murphy. I
19 reside at 407 E Street, N.E.

20 CHAIRPERSON GRIFFIS: Good. Mr. Murphy,
21 do you have any position on the party status
22 application? Are you in support or in opposition to
23 the request?

24 MR. MURPHY: I would oppose his party
25 status.

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1 CHAIRPERSON GRIFFIS: Okay. And is it
2 based on anything of -- in terms of them no making the
3 -- reaching the requirements for establishment of --

4 MR. MURPHY: I -- honestly, Mr. Chairman,
5 I cannot speak at this point to --

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. MURPHY: -- the exact requirements of
8 party status. So.

9 CHAIRPERSON GRIFFIS: Not needed. Let me
10 reiterate some of the important aspects that I find in
11 our establishing party status.

12 The -- the six criterion that we ask in
13 our application goes to whether and how a person would
14 be significantly, uniquely, and distinctly affected if
15 this was allowed to proceed and I think just based on
16 the proximity of the -- the applicant for party
17 status, it seems to meet all the criterion for
18 establishing party status.

19 So, let me hear from any Board members
20 that are in opposition to that position and if there's
21 no opposition to the request for party status, I would
22 take it then that we would establish the Nejad family,
23 residents of 405 E Street, N.E. as a party in
24 opposition to the application and let's move ahead
25 then.

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1 Mr. Murphy, we'll turn it over to you for
2 the presentation of the case.

3 MR. MURPHY: Great. Thank you, Mr.
4 Chairman, fellow members of the Board.

5 I'm here seeking a variance for the deck
6 that was constructed. It was actually constructed in
7 2003 and replaced -- this is a picture of the previous
8 structure that stood from -- we went back recently
9 through the archives, DCRA sent my wife down into the
10 bowels of someplace on 14th and Newton or somewhere
11 and spent the better part of the morning and best we
12 can surmise is that this structure was built sometime
13 before 1985. There was a -- a permitted renovation
14 done in 1985 where this deck is referenced.

15 CHAIRPERSON GRIFFIS: So, this -- the
16 double decks, the two decks were permitted? It looks
17 like they might have been.

18 MR. MURPHY: What -- and I can get -- get
19 the BZA a copy of this -- this paper, but basically,
20 what it says it dealt with an interior renovation of
21 two -- two units on the interior and it said the decks
22 are not part of this permit. So, we couldn't find
23 anything prior to that, but they were referenced in
24 1985. So, they've been standing continually since
25 1985.

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1 CHAIRPERSON GRIFFIS: Or before.

2 MR. MURPHY: Or before and likely before
3 based on it --

4 CHAIRPERSON GRIFFIS: All right.

5 MR. MURPHY: -- was referring to them --

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. MURPHY: -- in the present tense as
8 standing.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. MURPHY: So, the District from what I
11 could tell was on notice of a nonconforming structure
12 since, you know, at least 1985.

13 CHAIRPERSON GRIFFIS: Let me -- I'm sorry.
14 Let me interrupt you very briefly here so I can get a
15 full idea of what we're actually looking at.

16 So, these were existing. The first level
17 deck that was existing prior to the modification of
18 what we're looking at now, was the footprint the same
19 or was it more than the -- than the current deck?

20 MR. MURPHY: The footprint currently is
21 significantly less. If this extended out several more
22 feet --

23 CHAIRPERSON GRIFFIS: So, if I look at
24 your submission and -- and the reason why I'm asking
25 especially --

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1 MR. MURPHY: Yes, I mean that --

2 CHAIRPERSON GRIFFIS: -- that's the
3 submission which we can't read. But, as I look at it
4 even closer, it looks like the old deck bottom level
5 was 14 by 14, 196 --

6 MR. MURPHY: Yes. That was -- that was my
7 contractor's estimate. That was in --

8 CHAIRPERSON GRIFFIS: A hundred and
9 ninety-six square feet. The current deck is 8 by 14.
10 So, it's actually less.

11 MR. MURPHY: Yes, we -- we pulled it back.
12 We pulled it back to roughly the size of the top deck
13 and you can see a couple of houses down there's --
14 there's a deck here at 411 and then there's actually
15 another one at 413 that are --

16 CHAIRPERSON GRIFFIS: Okay. What was the
17 structural integrity of the existing deck?

18 MR. MURPHY: It was extremely unsafe. If
19 -- if we didn't take it down in 2003, gravity was
20 going to take it.

21 CHAIRPERSON GRIFFIS: So, it was falling
22 down. So, you basically did a reconfiguration
23 modification and structural alterations.

24 MR. MURPHY: Yes.

25 CHAIRPERSON GRIFFIS: Let me -- let's --

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1 let's cut to the chase here.

2 There's two questions. First of all, if
3 I'm not mistaken, the Office of the Planning brought
4 up the aspect that 2001.3 would need to be added for
5 relief if we went to -- is that correct? Am I
6 remembering correctly?

7 MR. PARKER: Yes, that's correct, Mr.
8 Chair.

9 CHAIRPERSON GRIFFIS: Excellent and --

10 MR. MURPHY: And that's -- that deal with
11 the nonconforming structure.

12
13 CHAIRPERSON GRIFFIS: Right. Exactly.
14 Additions to non-conformities, but then let's go to
15 2002.4 which if I'm also not mistaken that the Capitol
16 Restoration Society cited that actually went to
17 whether this would need to be here or not.

18 MR. MURPHY: Yes, I mean if I can revisit
19 just briefly the history of --

20 CHAIRPERSON GRIFFIS: Or 2001.2.

21 MR. MURPHY: 2001.2, yes.

22 CHAIRPERSON GRIFFIS: I'm sorry. I don't
23 know why 2002's in my head.

24 MR. MURPHY: And just briefly the -- this
25 history of why we filed this BZA application was more

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1 of less under duress. We've got -- we got -- on
2 October 26, we got a stop work order issue -- order as
3 part of our interior renovations under the two permits
4 that I listed and we were right towards the end of our
5 renovation getting ready to move back in. Our lease
6 on our temporary place was running out.

7 On Wednesday at ten to 5:00, a building
8 inspector comes by and slaps up a stop work order on
9 our interior work which we later found out was at the
10 behest of Mr. Nejad complaining and apparently, this
11 is how it was conveyed to me. Is that was told that
12 we were -- we were actually building the deck, working
13 on the deck and, therefore, we were working off permit
14 and we didn't have the proper permits.

15 So, they -- on a Wednesday afternoon, the
16 Sunday before we were going to move back into our
17 place, into the first floor, we got shut down and the
18 condition at DCRA was that immediately file a BZA
19 application in order to get the stop work order
20 lifted.

21 So, the 2001.2 issue came up well after --
22 unfortunately, because of the stop work order, we
23 weren't able to move back in in time. We had to take
24 a place at Woodley Park for an additional month
25 because of the -- you know, they shut us -- basically,

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1 shut us down until the day before we were going to
2 move back in. So, I mean that's how we got before the
3 BZA at this point and then the 2001.2 issue came up as
4 Mr. Eccenwiler raised it as part of the Capitol Hill
5 Restoration Society meeting.

6 CHAIRPERSON GRIFFIS: Okay. Was the --
7 was the -- was the structural alteration of the
8 existing deck part of the permit that was pulled for
9 the interior?

10 MR. MURPHY: We -- we attached it to -- to
11 that and we actually got I think Capitol Historic
12 Society to sign off on it and we got the --

13 CHAIRPERSON GRIFFIS: So, it's a -- it was
14 -- it was permitted?

15 MR. MURPHY: -- DCRA -- it was -- we
16 attempted to permit it and then it got -- apparently
17 got checked after at Zoning.

18 CHAIRPERSON GRIFFIS: I see. So, that's
19 what was held.

20 MR. MURPHY: So. But, when we submitted
21 our plans for the interior renovation under -- I
22 forget the permit numbers right now, but --

23 CHAIRPERSON GRIFFIS: That's okay.

24 MR. MURPHY: -- the deck was -- the deck
25 was part of that and the record reflects that the deck

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1 was typed onto the permit and it was signed off on by
2 the Capitol Hill or the Historic Review Committee.

3 CHAIRPERSON GRIFFIS: Okay. So, in terms
4 of the variance before us, we're looking at the rear
5 yard which has actually been reduced from the existing
6 condition if we call the two decks existing condition.

7 MR. MURPHY: Um-hum.

8 CHAIRPERSON GRIFFIS: The rear yard relief
9 has been -- well, is reduced from that which was
10 existing and so, the same would go for the lot
11 occupancy. Is that correct?

12 MR. MURPHY: Yes, I mean I -- I don't know
13 how exactly you would calculate the lot occupancy
14 based on the two levels.

15 CHAIRPERSON GRIFFIS: And it would be the
16 larger footprint of one below.

17 MR. MURPHY: Okay. Yes. Yes, it would
18 and they'd reduce it probably by a good ten percent
19 overall the lot occupancy.

20 CHAIRPERSON GRIFFIS: I see. On 2001.3 is
21 invoked in all of those. So, obviously, it's the same
22 variance test and relief that's required. Okay.

23 Any other questions? What else did you
24 want to go through if anything?

25 MR. MURPHY: Just a couple -- a couple of

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1 things I'd like to quickly point out in the record --

2 CHAIRPERSON GRIFFIS: Good.

3 MR. MURPHY: -- is that, you know, we've
4 received substantial support from our neighbors at 409
5 E Street on -- which is right here 445 4th Street have
6 both sort of sua sponte decided to support the
7 application.

8 We had another neighbor I think three
9 doors down at 439 or 441 that we've actually never
10 even met and never met to this day who wrote us a nice
11 letter in support.

12 So, generally, the outpouring of support
13 for the application's been fine. The people who have
14 seen our sign on the street and stopped who
15 immediately thought we were applying for some sort of
16 liquor license or something. Once I cleared that up,
17 they were very understanding of the situation and
18 given, you know, various levels of oral support.

19 The opposition what you'll hear I
20 addressed this in my February 23rd supplement to the
21 Board kind of lays out the general time line of the
22 opposition.

23 We -- prior to beginning work on our
24 interior renovations, I was informed that our work had
25 been causing damage to the residence at 405 E Street.

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1 This didn't work because this was, you know, more
2 than two and a half months before we started our work
3 and after that, I mean I sort of view this as
4 degenerating into sort of a petty neighbor dispute as
5 opposed to a sort of meritorious opposition.

6 CHAIRPERSON GRIFFIS: Good. Well --

7 MR. MURPHY: I think I've -- I've laid out
8 the record.

9 CHAIRPERSON GRIFFIS: -- we won't --

10 MR. MURPHY: I --

11 CHAIRPERSON GRIFFIS: -- we won't
12 degenerate into that level.

13
14 MR. MURPHY: Yes, I -- I don't want to --

15 CHAIRPERSON GRIFFIS: But, we're -- we're
16 going to keep it at that as you say meritorious level.

17 MR. MURPHY: Yes.

18 CHAIRPERSON GRIFFIS: Talk to me about why
19 this deck doesn't diminish the privacy of the adjacent
20 neighbor's light, air or any other aspect.

21 MR. MURPHY: Well, I think that -- I mean
22 -- I mean the air is very, very -- I mean the deck is
23 very open as opposed to -- as opposed to what it was
24 before.

25 I've -- I've noticed in the morning --

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1 this is a southern exposure. So, you get a lot of --
2 a lot of light in the back. It does -- the deck
3 structure does cast a bit of a shadow on the structure
4 of the house not the ground that has been the
5 complaint about not -- not drying out.

6 It doesn't cast into the yard a shadow
7 above where the fence line is from what I can tell. I
8 haven't obviously spent every minute of a solar cycle
9 tracking it, but I've -- I do notice that it does to
10 some degree cast onto the back vertical structure of
11 the house. But, that -- even during the -- it was I
12 think a low sun time in January/February and it abated
13 completely by, you know, 11:30/11:15 between, you
14 know, by noon everyday. So, there's very high sun in
15 the back.

16 The previous structure was never subject
17 to a complaint of light or air.

18 My neighbors on either side have attested
19 that this is not an invasion of privacy.

20 Where I'd want to look into either
21 anybody's house in our alley, it would just as be easy
22 to just hang out my window. It's not -- I mean these
23 are, you know, adjoining row houses. There's not --
24 there's sort of a limited expectation of privacy when
25 you're living right on top of each other.

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1 Were I interested in the least what my
2 neighbors were doing, it would be just as easy to hang
3 out my window and --

4 CHAIRPERSON GRIFFIS: Understood. And the
5 -- the level at which the deck comes off of is the
6 main level of the residential use. Is that correct?
7 That's your first floor.

8 MR. MURPHY: This is actually -- this is
9 our second floor.

10 CHAIRPERSON GRIFFIS: Where you have a
11 basement level. Is that correct?

12 MR. MURPHY: Well, it's -- it's a -- it's
13 a three-story walkup.

14 CHAIRPERSON GRIFFIS: Okay.

15 MR. MURPHY: I don't have a good front
16 shot of the house.

17 CHAIRPERSON GRIFFIS: That's all right.
18 So, your cellar level -- is there -- is there a
19 communication -- well, do you have a unit in the
20 basement? A -- a rental unit?

21 MR. MURPHY: It was originally. We've --
22 we've currently -- it was when we -- when the house
23 conveyed to us in 1997, it was carved into two units.

24 CHAIRPERSON GRIFFIS: Right. And you're
25 taking over the whole thing.

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1 MR. MURPHY: And permitted for -- yes,
2 we've --

3 CHAIRPERSON GRIFFIS: Although you're --

4 MR. MURPHY: The infrastructure for a unit
5 is there.

6 CHAIRPERSON GRIFFIS: Right.

7 MR. MURPHY: The kitchen hookups.
8 Separate light and, you know, separate utilities.

9 CHAIRPERSON GRIFFIS: Okay.

10 MR. MURPHY: Separate heating system.

11 CHAIRPERSON GRIFFIS: My point is looking
12 at this as if that was the main -- it's totally above
13 grade the -- the first level on the elevation on the
14 street frontage?

15 MR. MURPHY: Yes, I think there's a four
16 or five step walkup from the sidewalk on E Street and
17 then it -- then you -- then you walk in on that.

18 CHAIRPERSON GRIFFIS: You walk on grade
19 into the first level? You don't walk downstairs?

20 MR. MURPHY: Yes. No. Yes, you walk in
21 straight. Yes, you walk in on grade.

22 CHAIRPERSON GRIFFIS: Oh, well. Go ahead.

23 MEMBER MANN: Onto the kitchen level?

24 MR. MURPHY: No, onto the first level.
25 The kitchen -- based on the previous renovations, the

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1 kitchen now sits on the second level because that was
2 -- that was --

3 MEMBER MANN: The level where the --

4 MR. MURPHY: -- the primary level of the
5 top unit the way they -- the way they structured it
6 and the way we submitted our plans was to keep that
7 general layout with the kitchen on the second level
8 and what essentially could be -- it was permitted for
9 two unit. What essentially could be carved out as a,
10 you know, separate small little -- small little one
11 bedroom apartment downstairs.

12 MEMBER MANN: Okay. So, the front door of
13 the house is not on the same level as the kitchen and
14 deck?

15 MR. MURPHY: No. Yes. No.

16 MEMBER MANNER: I see.

17 CHAIRPERSON GRIFFIS: Okay. Anything else
18 at this point?

19 MR. MURPHY: I'd just add that since the
20 ANC's not here, we did get a letter of support from
21 the ANC and --

22 CHAIRPERSON GRIFFIS: Good.

23 MR. MURPHY: -- as well as the Capitol
24 Hill Restoration Society.

25 CHAIRPERSON GRIFFIS: Right. And we will

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1 -- we'll run through that as a -- as we go through.
2 Any initial questions from the Board? Ms. Miller.

3 VICE CHAIRPERSON MILLER: I just have a
4 question about the ANC letter. We have a letter.
5 It's our Exhibit 41 and it just seems to say that the
6 ANC considered the application. Unless I'm not
7 reading it --

8 MR. MURPHY: Yes, they -- and I can give
9 this -- I got this from the record last week. That
10 was submitted on February 28th. There's a -- a memo
11 from Ms. Wirt dated 3/8/05 with a duplicate copy of
12 the letter. It said previous correspondence re 407 E
13 Street did not note ANC vote. Letter corrected as
14 attached. Original signed by Chairman Dixon and here
15 they -- they throw on the tag-on sentence that the
16 vote was seven ayes and one nay to support the
17 application.

18 VICE CHAIRPERSON MILLER: Was that
19 submitted to the record?

20 MR. MURPHY: It -- I -- I got it from the
21 jacket last week and I'm happy to submit -- I got it
22 actually faxed to me by the BZA on March 10th. It was
23 submitted on -- I guess resubmitted on March 8th.

24 VICE CHAIRPERSON MILLER: Does it have an
25 exhibit number?

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1 MR. MURPHY: Exhibit 41. I guess it's the
2 second page of 41.

3 VICE CHAIRPERSON MILLER: Oh, then I'm
4 missing the second pages. We're missing -- okay.

5 MR. MURPHY: Okay. Would you like me to
6 submit this for -- can I get a copy of it back just
7 for my records?

8 CHAIRPERSON GRIFFIS: Yes, but if he got
9 it from the record, it should be in our record. He
10 doesn't need to submit his. Does anyone else have it
11 in front of them? Okay.

12 Well, we'll get copies of that and return
13 the original back to the applicant and also make
14 copies for the party in opposition to -- to look at.

15 Let's move ahead then. Any other
16 questions from the Board? Very well.

17 If there's no other questions, then let's
18 go to cross by the party in opposition of the
19 testimony that you've been presented today.

20 Do you have cross examination questions at
21 this point?

22 MR. NEJAD: I have for the Board and I'm
23 sure Mr. Murphy --

24 CHAIRPERSON GRIFFIS: Have a seat and
25 let's just introduce yourself. No. No. No. Right

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1 up here. Right at the table. You can turn the
2 microphone on. If you wouldn't mind giving me your
3 name and address for the record.

4 MR. NEJAD: Sure. My name is Nasser. My
5 last name is Nejad and our address is 405 E Street,
6 N.E.

7 CHAIRPERSON GRIFFIS: Good.

8 MR. NEJAD: And we're opposed to the deck
9 and I've already submitted my package --

10 CHAIRPERSON GRIFFIS: Right.

11 MR. NEJAD: -- to the Board and --

12 CHAIRPERSON GRIFFIS: You have indeed.
13 This is the time and the opportunity for you. You've
14 heard the testimony. You've seen the written
15 testimony into the record by the applicant and this is
16 your opportunity to ask questions of the -- questions
17 only. No presentation of your case. Questions only.

18 And it is for the purposes of let's say
19 bringing more information to the Board. So, you can
20 ask questions of the applicant that would -- that
21 would essentially poke holes in the testimony that
22 you've heard, support your case presentation, but in
23 the end, it's for the Board's information.

24 So, do you have any cross examination
25 questions or is it easier for you just to present your

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1 case?

2 MR. NEJAD: I can ask Mr. Murphy that
3 obviously you didn't get a permit when you were
4 building the new deck and while you were pargeting and
5 -- and repairing the foundation, you didn't get
6 permits for those.

7 CHAIRPERSON GRIFFIS: Is that a question?

8 MR. NEJAD: Yes. I'm asking did you get a
9 permit --

10 CHAIRPERSON GRIFFIS: Did you get permits
11 for --

12 MR. NEJAD: -- for those?

13 MR. MURPHY: At the time the deck was
14 built?

15 CHAIRPERSON GRIFFIS: Your mike.

16 MR. MURPHY: Sorry, Mr. Chair. No, at the
17 time we built the deck, no, we did not. We did not
18 get a permit. We attempted to rectify that
19 subsequently with our interior permit.

20 CHAIRPERSON GRIFFIS: Okay. Next.

21 MR. NEJAD: The contractor who built the
22 deck for you, did he know that you need a deck? That
23 you need the permit to -- to build the deck and do any
24 kind of construction in your property?

25 MR. MURPHY: He never informed me that we

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1 needed a permit and at the ANC, it was raised when he
2 was there before the Building and Zoning Committee
3 that from Mr. Chair, I think Anthony Rivera, of
4 whether at the time based on and I -- and I forget the
5 exact -- I think the minutes would reflect this,
6 whether a permit would have been necessary at the
7 time.

8 We -- based on the signals that we
9 received early on with our interior work attempted to
10 sort of rectify that. Just sort of put the issue
11 behind us. So, it was not an open issue anymore.

12 CHAIRPERSON GRIFFIS: Okay. Okay. And
13 let me just interrupt. Because there will be --
14 there's limited relevance to whether permits were or
15 weren't on this case. I mean obviously, we're looking
16 at -- we're looking at two things in my mind. One,
17 whether any relief is needed at all and we can hold
18 that until we're finished with this entire case, but
19 specifically whether a variance from the regulations
20 -- this is not an appeal of sorts where -- of any sort
21 where there's an error that was created. There should
22 have been permits. There should not have been, but
23 let's move ahead at this point.

24 MR. NEJAD: Well, Mr. Murphy claims that
25 he has letter of supports from the neighborhood. The

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1 next door neighbor between Mr. Murphy at --

2 CHAIRPERSON GRIFFIS: Is this a question?

3 MR. NEJAD: -- 409 there is not even a
4 fence between Mr. Murphy's and theirs. So, they're so
5 close. They're like relatives. So, even -- it's
6 asking my friend to give me a letter. You know, they
7 don't even have a fence in there. I don't know if
8 trying -- their trying to convert it to a condo or
9 something. I don't know.

10 CHAIRPERSON GRIFFIS: What's the question?

11 MR. NEJAD: Their privacy is --

12 CHAIRPERSON GRIFFIS: What's the question?

13 MR. NEJAD: My question is the letter that
14 he has from the neighborhood is -- they're not as
15 close as me and the one that is as close as me, they
16 don't even have a fence between them. So, the letter
17 I don't think it is as effective as it's suppose to
18 be.

19 CHAIRPERSON GRIFFIS: Do you agree? I'm
20 make that a question for you.

21 MR. MURPHY: I would -- I would agree that
22 there --

23 CHAIRPERSON GRIFFIS: Do you agree, Mr.
24 Murphy?

25 MR. MURPHY: -- I would agree that there

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1 is actually currently no fence between the two yards.

2 There is a little white picket fence to keep their
3 dog out of our yard.

4 We're in the process of -- we've applied.

5 We've got our plat. We've got our application filled
6 out for a -- for a fence to be built.

7 CHAIRPERSON GRIFFIS: What's the relevancy
8 to us?

9 MR. MURPHY: I -- I don't see any
10 relevancy. I mean I -- to say that --

11 CHAIRPERSON GRIFFIS: Does it diminish the
12 importance to the Board of the letters of support of
13 the surrounding area?

14
15 MR. MURPHY: I -- I don't believe so. I
16 mean they're --

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. MURPHY: -- I don't. It's --

19 CHAIRPERSON GRIFFIS: All right. Any
20 other questions?

21 MR. NEJAD: The question that I have is --
22 is Mr. Murphy raised the question that I complain
23 about the damage inside my house before they start
24 construction.

25 CHAIRPERSON GRIFFIS: Okay.

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1 MR. NEJAD: And that's a false claim.
2 Because they did work on the foundation and they build
3 a deck and the first floor was so damaged. That's why
4 they --

5 CHAIRPERSON GRIFFIS: What's the -- what's
6 the question to Mr. Murphy?

7 MR. NEJAD: His -- his claim is not right
8 because they did start the work before I complained.

9 CHAIRPERSON GRIFFIS: Mr. Murphy, timing?

10 MR. MURPHY: The timing was such that his
11 -- the initial thing he came to show me we did -- did
12 some work to parget the foundation because of the,
13 obviously, moisture problems which was in the back of
14 the house.

15
16 When he pulled me into his house on I
17 think it was April 18th, and my affidavit that I've
18 submitted to the -- to -- to the Board --

19 CHAIRPERSON GRIFFIS: We have it.

20 MR. MURPHY: -- lays it out, was talking
21 about popped up tiles in the front of his house. I
22 meant here's sort of no -- no proximity in location or
23 I mean temporal proximity. This was a -- this was a
24 property that he rented out to recent post-college
25 graduates for six years.

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1 CHAIRPERSON GRIFFIS: Okay. But, for
2 clarity of this, you're saying in your estimation and
3 timing of the scope of work that you started, there
4 was no correlation in terms of what impact could have
5 been made on adjacent property?

6 MR. MURPHY: No, I -- I -- none -- none at
7 all.

8 CHAIRPERSON GRIFFIS: And obviously, we're
9 going to hear a whole case presentation of why that
10 may well be different.

11 MR. MURPHY: Any work done in the back
12 would not have affected the --

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. MURPHY: -- tile in the front of his
15 house.

16 CHAIRPERSON GRIFFIS: Okay. And you also
17 submitted the inspector's report on this. Correct?

18 MR. MURPHY: Yes, sir, and this -- this
19 was an inspection that stemmed from I think a -- a
20 late July complaint.

21 CHAIRPERSON GRIFFIS: Okay. The inspector
22 was Mr. Meyers. Do you recall this, Mr. Nejad?

23 MR. NEJAD: Yes, I do. The only thing is
24 Mr. Meyers brought a plumbing inspector from DCRA just
25 to check if the connection is correct. That's all.

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1 Connection of the drain tile.

2 You see having a drain tile in row houses
3 is not to the code. They don't let you do that.

4 CHAIRPERSON GRIFFIS: Which code?

5 MR. NEJAD: It's -- it's suppose to be a
6 plumbing code or erosion code or it has to be --

7 CHAIRPERSON GRIFFIS: All right. Did the
8 inspector find that this wasn't to code?

9 MR. NEJAD: It -- it is not to the code.
10 Because you can -- drain tiles I mean suppose to
11 gather the -- the water and dump it either into the --

12 CHAIRPERSON GRIFFIS: I'm looking at the
13 inspection report. Mr. Meyers says second paragraph,
14 the connection met all applicable codes and was --

15 MR. NEJAD: Right.

16 CHAIRPERSON GRIFFIS: -- not connected to
17 Mr. Nasser's system.

18 MR. NEJAD: Exactly. That was -- that's
19 just the connection is correct. It doesn't mean the
20 whole thing is up to the code.

21 The only reason Mr. Meyers let it go is
22 because he was not trying to create problem of us
23 fighting --

24 CHAIRPERSON GRIFFIS: Okay.

25 MR. NEJAD: -- over something.

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1 CHAIRPERSON GRIFFIS: Okay. And -- and
2 we're not going to get into it either --

3 MR. NEJAD: But, it doesn't mean the work
4 was done right.

5 CHAIRPERSON GRIFFIS: -- because it -- it
6 actually moves well outside of our jurisdiction and
7 authority.

8 But, I wanted us to put -- because I want
9 to know if I'm looking at the correct thing. Because
10 the recommendation referral was that he was
11 emphasizing his previous recommendation that Mr.
12 Nasser seal up the connection between his downspout
13 and the storm water connection and he's indicating,
14 you know, caulking certain areas that were patched and
15 repaired. Is that your understanding also?

16 MR. NEJAD: I did not understand. What
17 was it again? I'm --

18 CHAIRPERSON GRIFFIS: His recommendation
19 to -- to --

20 MR. NEJAD: To me.

21 CHAIRPERSON GRIFFIS: -- diminish any of
22 the water. Because he -- my reading of this is he
23 found that it wasn't the adjacent property's water
24 coming over, but actually that which was created on
25 your property and he had --

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1 MR. NEJAD: That one was only a jab
2 between our -- our downspout and it's already been
3 covered. So.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. NEJAD: And I did cover it the same
6 day that he came.

7 CHAIRPERSON GRIFFIS: Okay. All right.
8 Let's move ahead then. Any other questions? Mr.
9 Nejad, any --

10 MR. NEJAD: Not from Mr. Murphy, but if --

11 CHAIRPERSON GRIFFIS: Okay. Good. I'm
12 going to call you up shortly then.

13 Let's move on to the Office of Planning's
14 report and ah, Mr. McGettigan is with us and just kind
15 of take a brief moment because it's come to my
16 attention, not that it's relevant to you folks at all
17 and I won't waste a lot of your time, but it's Mr.
18 McGettigan's last day with the Office of Planning or
19 at least before the Board of Zoning Adjustment and I
20 know that we've all enjoyed Mr. McGettigan's reports
21 and the -- the completeness and the thoroughness and,
22 you know, even the strong disagreements that the Board
23 has had with -- with his reports.

24 But, nonetheless, I know he's going on to
25 bigger and fun things. I won't say better because it

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1 can't get better than the District of Columbia, but
2 nonetheless, we know there's a great future and look
3 forward to hearing from you if not of you and let's
4 move ahead and --

5 MR. MCGETTIGAN: Thank you, Mr. Chair.

6 CHAIRPERSON GRIFFIS: -- have a report
7 presentation.

8 MR. MCGETTIGAN: Thank you, Mr. Chair,
9 members of the Board.

10 For the record, my name's David McGettigan
11 from the Office of Planning.

12 Our report is predicated on the assumption
13 that 2001.2 does not apply. Otherwise, DCRA would not
14 be sending it to the Board.

15 So, we didn't address that issue though I
16 mean necessarily doesn't mean we agreed with that
17 position. Just it's not addressed because we assume
18 that DCRA thinks it doesn't apply in this case.

19 So, we addressed the tests for the
20 variance and the -- there is evidence that there was a
21 building permit that includes the deck that was issued
22 and that is the exceptional situation I believe he's -
23 - the -- the work was completed with the assumption
24 that everything was okay and that -- that this was a
25 permitted development.

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1 And, two, the deck affects the interior
2 work that was done, the door from the kitchen and the
3 cabinetry. Therefore, there's practical difficulties
4 associated with complying with the regulations.

5 And, lastly, the -- the deck, we don't
6 believe approval of this variance will be a
7 substantial detriment to the public good and will not
8 impair the intent and purpose of the zone plan. The
9 deck is only one story which is less than what was
10 there before, the two story. It's a -- a smaller
11 dimension than what was there before. It's -- if you
12 look at the picture, it's not much higher than the
13 privacy fence that's already there. So, it's impact
14 on light is -- is minimal.

15 And the privacy, of course, it's always a
16 question in these very small tight neighborhoods where
17 the buildings are close together whether -- what kind
18 of privacy is -- is available. But, nothing that
19 couldn't be remedied if necessary with a -- a small
20 privacy screen which has been recommended in other
21 deck cases by the Office of Planning if that's found
22 to be necessary.

23 So, overall, we find this meets the test
24 and recommend support for the variance.

25 CHAIRPERSON GRIFFIS: Excellent. Thank

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1 you very much.

2 Questions from the Board.

3 VICE CHAIRPERSON MILLER: Do you recommend
4 a small privacy screen?

5 MR. MCGETTIGAN: Yes, I think based on the
6 proximity of the windows to -- to the deck of the
7 neighboring property, I would think that a small one
8 maybe extending out half -- you know, about four feet
9 would probably be helpful in increasing the privacy
10 for that neighbor.

11 VICE CHAIRPERSON MILLER: And I just also
12 want to thank you for your great service here and your
13 reports have been really very, very helpful including
14 this one. Good luck.

15 MR. MCGETTIGAN: Thank you.

16
17 MEMBER ETHERLY: Mr. McGettigan, would
18 that recommendation for the privacy screen also extend
19 to the other side or are you just suggesting the side
20 in question relative to the party in opposition?

21 MR. MCGETTIGAN: Yes, if the -- it also
22 would have the same situation on the other side. So,
23 yes.

24 MEMBER ETHERLY: Okay. Thank you, Mr.
25 Chair. Thank you, Mr. McGettigan.

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1 CHAIRPERSON GRIFFIS: Good. Thank you.
2 Okay. Any other questions from the Board? Yes? No,
3 Mr. Murphy, any cross examination of the
4 Office of Planning? Any questions? I'm assuming you
5 have their report. Is that correct?

6 MR. MURPHY: I have actually not seen
7 their report, but no questions and congratulations to
8 Mr. McGettigan.

9 CHAIRPERSON GRIFFIS: Or condolences I
10 suppose if you're leaving the District, but
11 nonetheless -- all right. A copy has been handed.

12 Do you -- does the party in opposition
13 have a copy of Office of Planning's report? No?

14 Do we -- do have an extra copy? You do?
15 Excellent. If you wouldn't mind.

16 MEMBER ETHERLY: I'd just like -- I'd like
17 to comment, Mr. Chair, that, you know, Mr. McGettigan
18 being prepared with multiple copies of his report
19 illustrates once again on his last day his
20 preparedness every step of the way.

21 CHAIRPERSON GRIFFIS: Indeed. However, we
22 also would note because we are so specific to detail,
23 that Mr. McGettigan did, in fact, write the wrong case
24 number on this which added to some delay in getting it
25 into the right folder here and there.

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1 MR. MCGETTIGAN: My apologies.

2 CHAIRPERSON GRIFFIS: But, why dwell on
3 the negative, Mr. McGettigan, with your last day.
4 We're all -- okay.

5 But, in all seriousness and directness in
6 this application. Does the applicant need additional
7 time to review this for proper cross examination?

8 MR. MURPHY: No, thank you, Mr. Chair.

9 CHAIRPERSON GRIFFIS: Okay. Do you have
10 any -- any cross of the -- the oral presentation of
11 the report?

12 MR. MURPHY: No, sir.

13 CHAIRPERSON GRIFFIS: Okay. Party in
14 opposition, do you have any cross of Office of
15 Planning or do you need a couple of minutes to review
16 this?

17
18 MR. NEJAD: This --

19 CHAIRPERSON GRIFFIS: I just need you to
20 speak into the microphone if you're going to say
21 anything.

22 MR. NEJAD: Yes, sir, I'm -- I'm troubled
23 with the idea of having the screen. I would like you
24 to test -- this is a hinge from the cabinet --

25 CHAIRPERSON GRIFFIS: Okay. No. No. No.

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1 Sit. Sit. Sit. I can't take anything up here
2 directly.

3 MR. NEJAD: Okay.

4 CHAIRPERSON GRIFFIS: Have a seat and let
5 me just --

6 MR. NEJAD: This is the hinge from my
7 cabinets.

8 CHAIRPERSON GRIFFIS: I see. Let me --

9 MR. NEJAD: Kitchen cabinets.

10 CHAIRPERSON GRIFFIS: Listen. I need to
11 interrupt you for a second.

12 MR. NEJAD: Sure.

13 CHAIRPERSON GRIFFIS: Because I keep
14 saying this to you.

15 MR. NEJAD: Um-hum.

16 CHAIRPERSON GRIFFIS: We're -- we're
17 creating an official transcript here.

18 MR. NEJAD: Um-hum.

19 CHAIRPERSON GRIFFIS: We can hear you
20 find.

21 MR. NEJAD: Okay.

22 CHAIRPERSON GRIFFIS: But, the transcript
23 can't. Everything you say --

24 MR. NEJAD: I see.

25 CHAIRPERSON GRIFFIS: -- into a

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1 microphone.

2 MR. NEJAD: Thank you, sir.

3 CHAIRPERSON GRIFFIS: Okay. Go ahead.
4 You were going to talk about -- you were going to ask
5 a question of the Office of Planning in their --
6 regarding their recommendation or potential
7 recommendation for a privacy screening on the sides of
8 the deck.

9 MR. NEJAD: Right. It's -- it further is
10 going to isolate our property from the light and air
11 which is creating the moisture in our first floor.
12 It's going to make it worse.

13 CHAIRPERSON GRIFFIS: Mr. McGettigan, the
14 question is don't you think if you recommend a privacy
15 screen that it would actually reduce the light and air
16 into the adjacent property and exacerbate the --

17 MR. NEJAD: We are trapped in back.

18 MR. MCGETTIGAN: It -- it can, but the
19 privacy screen is going to be -- it shouldn't be
20 solid. It should be 50 percent void so that light can
21 still come -- filter through it and while still --

22 CHAIRPERSON GRIFFIS: And air circulate.

23 MR. MCGETTIGAN: And air circulate through
24 it while still providing some screening.

25 CHAIRPERSON GRIFFIS: Okay. Good.

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1 Follow-up question?

2 MR. NEJAD: Well, and -- and I have given
3 the letter from Ms. Wort. I don't know if you've all
4 seen it. Have you read it?

5 CHAIRPERSON GRIFFIS: What is it?

6 MR. NEJAD: This is a letter from Ms.
7 Wort, the commissioner of 6C. The agency 6C.

8 CHAIRPERSON GRIFFIS: All right. The
9 single member commissioner.

10 MR. NEJAD: Right. You haven't considered
11 that --

12 CHAIRPERSON GRIFFIS: Here it is. But --
13 I'm sorry, but to reemphasize, this is your
14 opportunity to give -- to ask questions of the Office
15 of Planning based on their -- we haven't gotten to
16 your case presentation yet.

17 MR. NEJAD: Well, I prepare the package
18 last time. I give it to ANC. I don't know if they
19 looked at it. I'm not sure if you guys looked at
20 everything there. Have I -- have I --

21 CHAIRPERSON GRIFFIS: Okay. But, did you
22 understand what I said?

23 MR. NEJAD: -- am I -- yes, if I have any
24 questions --

25 CHAIRPERSON GRIFFIS: This is your time to

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1 ask questions of the Office of Planning and then we'll
2 get to your presentation of a full --

3 MR. NEJAD: Right.

4 CHAIRPERSON GRIFFIS: -- full case.

5 MR. NEJAD: Sure. Sure.

6 CHAIRPERSON GRIFFIS: But, do you have any
7 follow-up questions of the Office of Planning?

8 MR. NEJAD: Sure. If it was your
9 property, would the same thing happen to you, sir?

10 CHAIRPERSON GRIFFIS: Actually, it's not a
11 very relevant question to ask Mr. McGettigan to have a
12 personal opinion.

13 MR. NEJAD: Well, I don't have anything to
14 say. I mean.

15 CHAIRPERSON GRIFFIS: Well, that's fine.
16 You don't have to have.

17 MR. NEJAD: My privacy is gone. My I mean
18 air and sunlight is gone and --

19 CHAIRPERSON GRIFFIS: Okay. Let's move on
20 and then we'll get to your case presentation because I
21 think that's really what you're -- you're interested
22 in -- in getting to making sure that the Board
23 understands fully your position.

24 That being said, let's move ahead to the
25 ANC report, ANC-6C. We did indicate Exhibit Number

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1 41. I did find my copy. So, it is in the record, but
2 we have had copies made also of this -- this first
3 cover sheet of Mark Dixon.

4 As the party in opposition has just
5 indicated, we also have another letter, 37, which goes
6 to -- Exhibit Number 37 which goes to the ANC -- the
7 single member 08 commissioner which we should take
8 into consideration.

9 Any questions from the Board at this time?
10 Clarifications? Ms. Miller.

11 VICE CHAIRPERSON MILLER: I just want to
12 clarify that I -- what I was missing, but it was in
13 the record and it was the second page to Exhibit 41
14 which sets forth the vote of the ANC.

15 CHAIRPERSON GRIFFIS: Right. Indeed.
16 Which allows it to be given the great weight that we
17 can afford in our consideration. Is that correct?

18 VICE CHAIRPERSON MILLER: That's correct.
19 They've met the requirements.

20 CHAIRPERSON GRIFFIS: Very well. That's
21 all the reports that I have attendant to this outside
22 of the Capitol Hill -- the Restoration Society which
23 did also submit a letter, Exhibit Number 35, February
24 17. It was indicating their position on this
25 application unanimously to support the application and

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1 they also raised the question of section -- the
2 applicability of section 2001.2.

3 Okay. If that is all, let's move ahead to
4 the party in opposition case presentation at this
5 time. We're all set.

6 MR. NEJAD: Well, I -- I mean the package
7 that I have prepared I have said most of the things
8 that I'm -- I was suppose to say and I'm assuming that
9 everybody has looked at it.

10 CHAIRPERSON GRIFFIS: Absolutely looked at
11 it and read the whole thing.

12 MR. NEJAD: I have one problem with the
13 ANC conducting the meetings and -- and the Historic
14 Restoration Society conducting the meeting.

15 CHAIRPERSON GRIFFIS: Right.

16 MR. NEJAD: At the first meeting, they
17 voted for the applicant and -- and one gentleman named
18 Mike --

19 CHAIRPERSON GRIFFIS: Right. Actually,
20 let me -- you --

21 MR. NEJAD: I can --

22 CHAIRPERSON GRIFFIS: -- you put it in --
23 you put it in your -- your written submission and let
24 me just give you a little direction here.

25 As much as I personally would love to get

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1 involved on how ANC's conduct themselves and should
2 conduct themselves, I cannot and more directly, this
3 Board has no authority or jurisdiction over the
4 workings of the ANC. What we need to do is -- to put
5 it into perspective here, we need to look at the very
6 specific facts in this cases. So, I think you raise
7 some important ones. You raise light, air, privacy.

8 MR. NEJAD: Exactly.

9 CHAIRPERSON GRIFFIS: Let's stick to that.

10 MR. NEJAD: That's the major thing.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. NEJAD: Yes.

13 CHAIRPERSON GRIFFIS: Rather than who said
14 what or how it was all done or --

15 MR. NEJAD: I think -- I think these are
16 -- these are the basic right of every -- every living
17 species and I think I have to have that.

18 CHAIRPERSON GRIFFIS: Okay.

19 MR. NEJAD: Please consider that when
20 you're ruling for it.

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. NEJAD: And I don't have nothing else
23 to say. This is very important to me and -- and our
24 first floor is not really livable because of it.

25 CHAIRPERSON GRIFFIS: Because of the

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1 presence of the deck?

2 MR. NEJAD: Yes.

3 CHAIRPERSON GRIFFIS: Has it ever been
4 livable? How was it livable when there were existing
5 two decks on the house that were larger?

6 MR. NEJAD: We did not live there for
7 seven years. So, we didn't notice --

8 CHAIRPERSON GRIFFIS: You mean you had to
9 move out of the house because there were decks on the
10 edge?

11 MR. NEJAD: Not -- not -- not because of
12 that. We had a family problem. We had to leave.

13 CHAIRPERSON GRIFFIS: But, someone lived
14 there or no?

15 MR. NEJAD: Yes, it was rented for seven
16 years.

17 CHAIRPERSON GRIFFIS: Okay. So, somebody
18 lived there.

19 MR. NEJAD: And then we came back. Then
20 we came back. When we came back, one day I saw
21 gentleman is demolishing the deck and I knocked on the
22 door -- on Mr. Murphy's door. Nobody opened the door.
23 And I knocked on the next-door neighbor who -- who are
24 their friends and I asked her do they know what
25 they're doing and said yes, Mr. Murphy is a lawyer and

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1 -- and the contractor and my wife -- my husband is a
2 -- is a architect and we know what we're doing.

3 So, okay, would you ask Mr. Murphy to
4 knock on my door and talk to me please. It never
5 happened.

6 CHAIRPERSON GRIFFIS: Okay. But, let's
7 get to -- back to the issue.

8 MR. NEJAD: And it never happened and all
9 of a sudden one weekend, the whole deck is up.

10 CHAIRPERSON GRIFFIS: Okay. But -- okay.
11 So, that's where we are.

12 MR. NEJAD: You know, it's --

13 CHAIRPERSON GRIFFIS: Let's --

14 MR. NEJAD: They knew they're not suppose
15 to build it and they did it. That's why we are here.

16 CHAIRPERSON GRIFFIS: Let's talk about the
17 impacts of the deck. Let's --

18 MR. NEJAD: The impacts of the deck is my
19 privacy, air, sunlight, and -- and we don't have no
20 privacy --

21 CHAIRPERSON GRIFFIS: Okay.

22 MR. NEJAD: -- in one-third of our house.

23 CHAIRPERSON GRIFFIS: But --

24 MR. NEJAD: The second floor window is
25 right next to -- it's like their deck is zero inches

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1 from --

2 CHAIRPERSON GRIFFIS: Right.

3 MR. NEJAD: -- our yard.

4 CHAIRPERSON GRIFFIS: And what type of
5 privacy do you expect in a row dwelling when you have
6 windows all facing out onto rear yards or you would
7 conceivably have a staircase which would be allowable
8 that would access the rear -- rear yard? What is --

9 MR. NEJAD: Well, the --

10 CHAIRPERSON GRIFFIS: -- the -- what's the
11 threshold that we should compare?

12 MR. NEJAD: -- that makes sense because
13 the time that they can use their staircase is a lot
14 less than just sitting there and barbecuing on a
15 wooden deck which is --

16 CHAIRPERSON GRIFFIS: Want to see. I see.

17 MR. NEJAD: That's another dangerous thing
18 that we don't like. Because all these are attached
19 row house.

20 CHAIRPERSON GRIFFIS: Sure.

21 MR. NEJAD: And this is a wooden deck and
22 that's next to the kitchen. They're trying to rent
23 the basement. They're going to have the -- the deck
24 as a yard. They're going to use barbecue there which
25 they did before and any -- any fire is going to take

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1 the whole block down. That's one thing.

2 Another thing is our air and light and
3 privacy and the reason we did not complain before
4 because first of all, we were not living in there for
5 a -- for a long time and we did not notice the damage
6 to our property before because we were not living in
7 there and it was not reported to us because there was
8 a kid going to school.

9 And as soon as we moved in, we see all of
10 our appliances are rotten. Our -- our kitchen
11 cabinets are peeling off. Our -- the hinges from
12 kitchen cabinet, these are stainless steel.

13 CHAIRPERSON GRIFFIS: And those are -- how
14 far inside are those? Those hinges that you have.

15 MR. NEJAD: Just right -- right on that
16 wall.

17 CHAIRPERSON GRIFFIS: Right on the wall?

18 MR. NEJAD: Right on the wall adjacent to
19 the deck. It is -- I think identify -- you have that
20 in your -- in your package, sir.

21 CHAIRPERSON GRIFFIS: Okay. Let me --
22 well, okay. And that shed enclosure is on your side.
23 Is that correct? That little stationary.

24 MR. NEJAD: The plastic ones, yes.

25 CHAIRPERSON GRIFFIS: Made by Rubbermaid.

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1 MR. NEJAD: Yes, correct.

2 CHAIRPERSON GRIFFIS: Indeed. And the
3 rear of your building faces south. Is that right?

4 MR. NEJAD: Yes.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. NEJAD: For a good portion of the day,
7 we don't have sunlight, sir. Until like 1:00 or 2:00.

8 And the privacy I'm talking about, you're
9 sitting in the backyard and their deck is right here.

10 It's nine-feet high. It's run right here. You know,
11 they're just sitting right on top of our head. It's
12 not like they're sitting somewhere we don't see them
13 or we just hear them. No, it's right there.

14 CHAIRPERSON GRIFFIS: Understood.

15 MR. NEJAD: And another question that I
16 have, at one point -- at what point, they can stop
17 covering the lot. When you given the -- if you allow
18 it to -- to -- them to leave the deck the way it is,
19 they can have a two-story building the same way. It's
20 a coverage. It's more than 60 percent. They can
21 build -- they can build -- they can cover it as a --
22 as a -- as a coverage.

23 CHAIRPERSON GRIFFIS: Well, one can't
24 predict what it all is, but conceivably even if this
25 was found not to need any sort of relief based on

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1 2001.2 meaning that there was an existing deck, if
2 they -- to address your concern, if -- if they then
3 went to enclose this, it would absolutely take
4 additional relief to do that because that would be
5 another addition to a nonconforming structure. It
6 would actually increase the enclosed area. It would
7 probably do -- it probably would kick into other sorts
8 of relief that was required.

9 So, no, I don't think this -- processing
10 this in anyway kind of opens up an endless stream of
11 potential additions or construction on the property.

12 Very well. Any other --

13 MR. NEJAD: Another thing -- I'm sorry I
14 did not finish.

15 CHAIRPERSON GRIFFIS: Yes. Go ahead.

16 MR. NEJAD: On third floor, we have to
17 cage ourself in because of the deck that was there
18 before and is there now.

19 CHAIRPERSON GRIFFIS: Cage yourself in?

20 MR. NEJAD: Yes, because we have to have
21 bars on the second floor, too, now. So, if it -- if
22 -- if anything --

23 CHAIRPERSON GRIFFIS: For security.

24 MR. NEJAD: -- window guards.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. NEJAD: We have to have that because
2 they can walk right from the deck to our window
3 anytime they want. So, had to put a guard in there.

4 Now, if -- if fire happens, we have to run
5 to the front and get -- get out. It's dangerous.

6 Now, they can have a small ladder from the
7 deck to our window, third floor. Now, we have to have
8 another guard for the third floor, too. Because
9 before it was covered. The -- the -- the deck before,
10 it was double deck.

11 CHAIRPERSON GRIFFIS: Right.

12 MR. NEJAD: Nobody could get higher. Now,
13 it's single. Now, they can get higher, too.

14 CHAIRPERSON GRIFFIS: I don't know.

15 MR. NEJAD: See the leg.

16 CHAIRPERSON GRIFFIS: I mean --

17 MR. NEJAD: See the leg right there. You
18 see.

19 CHAIRPERSON GRIFFIS: What would stop
20 someone from getting a ladder --

21 MR. NEJAD: Okay.

22 CHAIRPERSON GRIFFIS: -- into your
23 property and getting up to any of those windows or
24 conceivably starting down at the end of the block
25 getting on the roof and walking across and coming

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1 through your roof?

2 MR. NEJAD: Yes, I understand they can
3 that which they did.

4 CHAIRPERSON GRIFFIS: I mean there's a
5 reality of attached houses.

6 MR. NEJAD: No, I understand. They did,
7 sir. As soon as they started the construction, we
8 lost two bicycle from backyard.

9 But, that -- I'm not accusing anybody, but
10 look at -- look at the gates, the guards that we have
11 on the second floor. You have to cage us in because
12 of the deck. Otherwise, we wouldn't have it.

13 Now, if any fire happens, we have to jump
14 from the third floor to backyard or go run to the
15 front from third floor.

16 CHAIRPERSON GRIFFIS: Mr. Etherly.

17 MEMBER ETHERLY: Thank you, Mr. Chair.
18 I'd like to follow up on -- on a couple of your --
19 your questions with Mr. Nejad.

20 MR. NEJAD: Yes.

21 MEMBER ETHERLY: Correct? I want to be
22 sure I have the pronunciation correct. Under -- under
23 this application there's -- there's a very specific
24 aspect of the analysis that deals with substantial
25 detriment and I think a significant part of the

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1 concerns that you've expressed fall under that
2 category of concerns or allegations about substantial
3 detriment.

4 Now, based on your testimony, I've kind of
5 broken it down into a couple of things that I want to
6 kind of walk through so I have a clear understanding
7 of what you're experience has been, but in a very
8 focused way --

9 MR. NEJAD: Sure.

10 MEMBER ETHERLY: -- as it relates to the
11 decks.

12 Now, there was a period of time
13 approximately seven years or so where you were not
14 residing at the property. You had a tenant who was
15 residing at the property and I believe you indicated
16 that that tenant was a student.

17 MR. NEJAD: Correct.

18
19 MEMBER ETHERLY: Was attending university.
20 So, that -- that tenant perhaps had a very different
21 lifestyle from what you and other members of your
22 family may presently enjoy.

23 MR. NEJAD: Exactly, sir.

24 MEMBER ETHERLY: You -- did you have or do
25 you recall any concerns or complaints expressed by

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1 that tenant?

2 MR. NEJAD: No.

3 MEMBER ETHERLY: Okay. When did you move
4 back into the subject property?

5 MR. NEJAD: In -- August -- in October of
6 2003.

7 MEMBER ETHERLY: Okay. And at that
8 particular time, was the -- was the second deck still
9 -- was that still in existence?

10 MR. NEJAD: No.

11 MEMBER ETHERLY: That had been taken down
12 by that time. So, when --

13 MR. NEJAD: Summertime when I, you know,
14 it was -- the house was empty for three/four months so
15 we can paint it.

16 MEMBER ETHERLY: Okay.

17 MR. NEJAD: So, everyday I was going in
18 there --

19 MEMBER ETHERLY: Okay.

20 MR. NEJAD: -- to check if they're doing
21 their work and everything is okay.

22 MEMBER ETHERLY: Okay.

23 MR. NEJAD: The deck was -- I think before
24 August was there. Sometime around July and August,
25 they took it down.

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1 MEMBER ETHERLY: Okay. The higher deck?

2 MR. NEJAD: Right. The -- I mean the
3 whole thing.

4 MEMBER ETHERLY: The whole thing came
5 down.

6 MR. NEJAD: Yes, this -- this deck is
7 brand new.

8 MEMBER ETHERLY: Okay. Okay. So, when
9 you came into -- you -- but, you moved into your
10 property around the fall of 2003.

11 MR. NEJAD: Yes, correct.

12 MEMBER ETHERLY: Okay. Now, the second
13 piece that you -- that you reference as relates to a
14 substantial detriment that I'm -- that I'm -- that I'm
15 hearing an allegation about concerns the -- the mold
16 piece which I think broadly speaking might perhaps,
17 you know, speak to use and enjoyment of your property.

18 MR. NEJAD: Right.

19 MEMBER ETHERLY: When you -- when you
20 moved into your residence, mold and smell, did you
21 first notice that when you moved in or is it something
22 that --

23 MR. NEJAD: Once before we move in when I
24 was checking, I saw mold around the seat in the
25 toilet.

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1 MEMBER ETHERLY: Okay.

2 MR. NEJAD: I cleaned it up and I did not
3 know where is it coming from and -- and I thought
4 maybe because all the windows are closed because I
5 close them --

6 MEMBER ETHERLY: Um-hum.

7 MR. NEJAD: -- because of the rain and
8 nobody is there.

9 MEMBER ETHERLY: And that particular
10 bathroom is at the rear of your property as well?

11 MR. NEJAD: No, it's in the middle.

12 MEMBER ETHERLY: Okay. It's in the
13 middle.

14 MR. NEJAD: It's in the middle of the
15 first floor.

16 MEMBER ETHERLY: Okay.

17 MR. NEJAD: It's a powder room and -- and
18 I cleaned it up and I left the windows a little bit
19 open and -- and then I did not notice it and we were
20 so happy we were coming back to our house because we
21 build it for ourself in 1994.

22 MEMBER ETHERLY: Um-hum.

23 MR. NEJAD: And -- and it was like one
24 week or two weeks after that, we noticed the smell.
25 It's -- it's -- we can't -- it's too bad. The smell

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1 is coming so much.

2 MEMBER ETHERLY: And -- and was that --
3 from a timing standpoint, did that coincide with the
4 construction of the current -- of the new deck? I
5 mean what I'm -- what I'm probing is trying to
6 understand whether there's a connection.

7 MR. NEJAD: No. No, the deck was done in
8 summer.

9 MEMBER ETHERLY: Um-hum.

10 MR. NEJAD: And we were not living in
11 there.

12 MEMBER ETHERLY: Okay.

13 MR. NEJAD: We did not notice it until we
14 moved in there.

15 MEMBER ETHERLY: Okay. Okay. Okay. With
16 respect to -- I -- I think I understand that issue.
17 With respect to the privacy issue, just to be sure I'm
18 clear in terms of your testimony and -- and the facts
19 that we have, based on what is -- what is labeled as
20 Supplemental Exhibit E, it's the -- it's the
21 photographic illustrations provided by the applicant,
22 your property, of course, is what can be described as
23 that white building immediately adjacent to the
24 subject property.

25 That window which is on what would be your

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1 second level immediately adjacent to the deck --

2 MR. NEJAD: Right.

3 MEMBER ETHERLY: -- is your -- is your --
4 is your bedroom window.

5 MR. NEJAD: Right.

6 MEMBER ETHERLY: Okay. The window above
7 that, is that also a bedroom window as well?

8 MR. NEJAD: Yes. Yes.

9 MEMBER ETHERLY: And then below that, it's
10 not pictured here --

11 MR. NEJAD: That's kitchen.

12 MEMBER ETHERLY: -- in the illustration,
13 but below that, that is your kitchen window.

14 MR. NEJAD: Correct.

15 MEMBER ETHERLY: Okay. With respect to
16 your bedroom window at this particular point, you've
17 now been in your property for a number of months, the
18 deck has been up for a number of months.

19 MR. NEJAD: Correct.

20 MEMBER ETHERLY: Albeit during the fall.
21 So, perhaps, you didn't get the full benefit of an
22 actual summer experience, but has it been your
23 experience that you had noise or other disturbances
24 relative to your privacy since you've been back in the
25 property based on the existing deck now?

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1 MR. NEJAD: Since we've been in our
2 property, when we sit in our backyard, we notice it.
3 We notice our privacy is not there because when they
4 used their --

5 MEMBER ETHERLY: Um-hum.

6 MR. NEJAD: -- their deck when we're using
7 our yard, we're both at the same time hearing each
8 other, seeing each other. It's not -- it's not really
9 private at all.

10 MEMBER ETHERLY: Okay.

11 MR. NEJAD: But, in the bedrooms, the
12 thing that is in your mind there is something there.
13 Somebody can be there all the time and it's just as
14 soon as you wake up, your -- your brain, your eyes --

15 MEMBER ETHERLY: It's unsettling to you.
16 Understood.

17 MR. NEJAD: Anybody there first and then
18 you do the rest of your --

19 MEMBER ETHERLY: Okay. Okay. Thank you.
20 I think I have an understanding of -- of your
21 concerns.

22 MR. NEJAD: It's not that they are there
23 all the time. Please don't get me wrong. I love Mr.
24 Murphy and his family. It's not -- it's not personal.
25 This is -- we think it's not morally right to -- you

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1 know, our privacy it really means a lot to us.

2 MEMBER ETHERLY: And it would be your
3 sense that a screen would not necessarily satisfy your
4 concerns?

5 MR. NEJAD: I believe it's going to worsen
6 the damage to our property as I showed.

7 MEMBER ETHERLY: Okay. Thank you.

8 MR. NEJAD: Because of -- they are
9 blocking the air and light.

10 MEMBER ETHERLY: Okay. Thank you. Thank
11 you, Mr. Chair.

12 CHAIRPERSON GRIFFIS: Other questions?
13 Ms. Miller.

14 VICE CHAIRPERSON MILLER: One very quick
15 question which I think you've just answered, but I
16 just want to clarify.

17 Mr. McGettigan from Office of Planning
18 seemed to recommend a privacy screen and if this were
19 to be approved and what I hear you say and I just want
20 to confirm is that you would prefer not that there be
21 a privacy screen. That that would infringe upon your
22 light and air and that your choice would be that there
23 wouldn't be one. Is that correct?

24 MR. NEJAD: I don't -- I cannot answer
25 that now unless it's up and I say yes or no because I

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1 don't know. I don't know how much of an affect it's
2 going to have.

3 VICE CHAIRPERSON MILLER: Okay.

4 MR. NEJAD: Because it's something that in
5 future we trying to do something that I want -- I
6 don't know the effect.

7 CHAIRPERSON GRIFFIS: Anything else? Any
8 other questions?

9 VICE CHAIRPERSON MILLER: Mr. Murphy, I
10 just want to ask you a couple of questions.

11 MR. MURPHY: Yes.

12 VICE CHAIRPERSON MILLER: Do you have an
13 opinion on this privacy screen recommendation, number
14 one?

15 MR. MURPHY: I -- I would be willing
16 either to do it or enter into some sort of interactive
17 process, a collaborative process to work with the
18 neighbors on either side to make it work. I'm sort of
19 agnostic on whether we do it or not. I'm -- I'm happy
20 to do it if the Board orders that. I'm happy to do
21 it. You know, respect the wishes of the neighbors on
22 either side.

23 VICE CHAIRPERSON MILLER: Okay. And I
24 just want to also get a -- a factual question
25 resolved. The deck was constructed in 2002 when?

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1 MR. MURPHY: It was actually in -- it was
2 roughly June/July of 2003. Yes, I -- I --

3 VICE CHAIRPERSON MILLER: Oh, June/July of
4 2003.

5 MR. MURPHY: Yes, I think I -- I -- I had
6 a 2002 date on -- on one of the -- one of the
7 submissions in the record. Yes, that was -- that was
8 a factual error.

9 VICE CHAIRPERSON MILLER: Okay.

10 MR. MURPHY: And I --

11 VICE CHAIRPERSON MILLER: And when was it
12 taken down? When was the old one taken down?

13 MR. MURPHY: It was -- they were
14 immediate. I mean one -- one went down and one went
15 up. There was no -- there was no gap.

16 VICE CHAIRPERSON MILLER: And it was taken
17 down because you think it was almost in a state of
18 collapse?

19 MR. MURPHY: It was. Yes, it was severely
20 bowing. It was stilted on 4 by 4s, you know, span on
21 2 by 6s. It was -- you know, it was terribly unsafe.

22 VICE CHAIRPERSON MILLER: Thank you.

23 MEMBER ETHERLY: Mr. Chair, I apologize
24 for -- for circling back on this, but I neglected to
25 ask perhaps what is -- what is the most important

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1 question for me. Is -- with respect to the issue of
2 the -- of the mold, have you had that looked at
3 professionally? Have you had anybody come out to
4 assess that problem? Because I'm -- what I'm
5 struggling with Mr. Nejad is the causal connection
6 between the deck and the mold. So, have you had
7 anybody take a look at that problem and advise you as
8 to potential causes?

9 MR. NEJAD: I have to say I'm an architect
10 for the last 20 years and I -- I work in D.C. for 20
11 years and I am a person who people come to and ask --

12 MEMBER ETHERLY: Okay.

13 MR. NEJAD: -- to find their problem. So,
14 I assessed it myself.

15 MEMBER ETHERLY: But, with -- okay. So,
16 based on your own experience as -- as an architect --

17 MR. NEJAD: Right.

18 MEMBER ETHERLY: -- is -- is it your sense
19 -- is it your sense that there is a -- you're alleging
20 that based on that experience, there is a connection
21 you feel between the decks -- the construction of the
22 new deck and the mold that you're experiencing in your
23 property?

24 MR. NEJAD: I -- I don't want to waste
25 anybody's time, but I have to explain something. Mr.

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1 Murphy's contractor explained to me something that
2 they installed the drain tile first. Either I
3 misunderstood or he misrepresented the case. First he
4 said that he has connected it to our drain.

5 MEMBER ETHERLY: Um-hum.

6 MR. NEJAD: You know drain tile you're
7 suppose to connect it to the storm water not the sewer
8 system. In order for them to do it, they have to dig
9 from the backyard all the way to the middle of the
10 street which they did not. They connected it to the
11 -- to the -- to the sewer system.

12 MEMBER ETHERLY: So, perhaps just to
13 summarize --

14 MR. NEJAD: That was wrong. First, we
15 thought that was the case, but that was wrong and --

16 MEMBER ETHERLY: Um-hum.

17 MR. NEJAD: -- and Mr. Meyers from DCRA
18 came and cleared it out that the connection does not
19 have anything to do with your property.

20 MEMBER ETHERLY: Okay.

21 MR. NEJAD: And another thing that comes
22 to mind is not having enough sunlight to dry out the
23 moist in that area.

24 MEMBER ETHERLY: I see. I see. Okay.

25 MR. NEJAD: And that's the result so.

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1 MEMBER ETHERLY: That answers my question.
2 Okay. That answers my question. Thank you, Mr.
3 Chair.

4 CHAIRPERSON GRIFFIS: Good. Of course,
5 you do have central air in your house. Is that
6 correct?

7 MR. NEJAD: Yes, I do.

8 CHAIRPERSON GRIFFIS: And also in the
9 lowest level?

10 MR. NEJAD: Yes, it's a central air. Yes.

11 CHAIRPERSON GRIFFIS: Okay. That would --
12 that would also impact the humidity level or any sort
13 of mold in the -- in the space. Would it not?

14 MR. NEJAD: Well, the gas furnace usually
15 dries out instead of -- instead of moisten it.

16 CHAIRPERSON GRIFFIS: Right. But, you're
17 concerned about the increased moisture level. I see.
18 Okay.

19 Have you -- you now have the Office of
20 Planning's report. Let me -- now, let's move ahead.

21 Any other questions from the Board? Let's
22 go to the applicant for any closing remarks you might
23 have, any summations, closing remarks.

24 MR. MURPHY: Summation -- I -- let my
25 previous statement stand.

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1 MEMBER MANN: Can you turn on your
2 microphone please?

3 MR. MURPHY: Sorry. In deference to the
4 Board's time here, but as far as the -- the -- just
5 address quickly the mold issue. I think the building
6 inspector's report sums it up nicely. That he has a
7 -- he has an impermeable brick patio with a crack
8 between that and his foundation which is drawing in
9 the moisture.

10 Our search through the archives shows that
11 that was neither permitted nor inspected. So, the
12 preliminary inspection is that that -- that's the
13 cause of the problem.

14 The causation -- this mold problem started
15 -- as you recall, we had the second wettest winter of
16 all time I think and I think everybody on our row is
17 reporting moisture problems. So, to -- there's just
18 no causality between our deck and the dampness in his
19 house. I mean all of these houses are damp to some
20 degree just based on their -- their age and the nature
21 of them.

22 And privacy, just in closing, I'd say that
23 I don't recall a single incident where I've been on
24 the deck and Mr. Nejad has been on the backyard --
25 been in his backyard. So, I think that's a bit of a

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1 red herring.

2 So, I just thank the Board for its time
3 and its consideration.

4 CHAIRPERSON GRIFFIS: Good. Thank you
5 very much. Very well. I think we have the record
6 complete in front of us. I think it's ready to move
7 ahead with the Board's deliberation and decision
8 today.

9 First of all, very typical and
10 straightforward issues. Obviously, they go directly
11 to portions of the test that we're looking at in terms
12 of the variance and the impact -- the negative impact,
13 of course, the dampness or light and air really is
14 what I was going to and privacy. I think there's --
15 there is an importance for our discussion on that.

16 I'm not sure that I have been persuaded
17 with the -- the case on this.

18 Quite frankly, I would, except for the
19 lack of time, make a very strong case that this
20 shouldn't even be before us. I think that provision
21 of 2001.2 completely covers it. The fact of the
22 matter that there was a larger deck that was
23 structurally failing as the testimony today, that it
24 was replaced and modified and structurally altered,
25 removing a portion of that which was above it seems to

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1 fall directly in line and I, in fact, disagree with
2 DCRA's position as is my ability to do the -- the
3 requiring relief.

4 However, I'm amenable in moving ahead as
5 we have the relief that's been presented before us and
6 have had the application before us and I would move
7 approval of Application 17264 and that would be for
8 relief from 2001.3. Also, the relief from section 403
9 and also 404 which constitutes a rear yard and also
10 the lot occupancy requirements.

11 I would ask for a second.

12 VICE CHAIRPERSON MILLER: Second.

13 CHAIRPERSON GRIFFIS: Thank you very much.

14 I'll let others speak to the motion at this time.
15 Ms. Miller.

16 VICE CHAIRPERSON MILLER: Mr. Chairman, I
17 think that a strong case has been made for the
18 variance test here. I think there is a unique
19 situation in which a building permit was issued for
20 the interior as well as the deck and the owner in this
21 case relied on that.

22 That -- that alone would not necessarily
23 necessitate the variance release, but then it leads to
24 the practical difficulty in this case of re-
25 configuring the whole kitchen and layout were this

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1 deck not to be allowed which would be a practical
2 difficulty to the owner and I don't think that there
3 is a case here of substantial detriment to -- to the
4 public.

5 The row houses are next to each other.
6 This is the way urban living is and the deck has been
7 here for awhile and it's an open deck and I don't
8 think that a case has been made for adverse impact of
9 light and air on the neighbors.

10 There was some testimony of mold, another
11 situation that the neighbor was experiencing, but I
12 don't think the evidence showed a clear nexus to the
13 -- the deck being the cause of that and, in fact, I
14 think the building inspector's report showed to the
15 contrary.

16 And with respect to privacy, I think
17 again, these are row houses. It's -- it's urban
18 living and the windows are next door to each other and
19 I don't think that -- that there is a big infringement
20 on the privacy of the neighbors by this deck.

21 CHAIRPERSON GRIFFIS: Yes, Mr. Mann.

22 MEMBER MANN: Mr. Chairman, I -- I agree
23 with you in that I don't think this case necessarily
24 even had to be here, but since it is, I do also agree
25 that the tests have been met.

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1 But, I just wanted to briefly address the
2 proposed possible condition of putting up the privacy
3 fence.

4 CHAIRPERSON GRIFFIS: Good.

5 MEMBER MANN: And I would actually suggest
6 that we do not impose that condition. There doesn't
7 seem to be any strong agreement or disagreement by any
8 of the neighbors that it's necessary.

9 CHAIRPERSON GRIFFIS: Excellent point and
10 -- and I -- I agree with you there. I think Mr.
11 McGettigan was -- was very careful in his choice of
12 words when he said the OP has in the past recommended,
13 but had not directly recommended in this case.
14 Certainly, it's an option. I know every Board member
15 here looking at this thought of it as an option based
16 on most often Office of Planning's recommendations
17 prior.

18 But, I agree with you. I don't see the --
19 the real need. It certainly wouldn't be precluded or
20 prohibited from doing so if it was found to be
21 necessary, but even the party in opposition has
22 indicated not supporting that aspect.

23 Yes, others. Mr. Etherly.

24 MEMBER ETHERLY: Thank you very much, Mr.
25 Chair. I will also speak in support of the motion and

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1 -- and I wanted to echo the comments of my colleague,
2 Mrs. Miller.

3 I -- I want to thank the -- the opponent
4 Mr. Nejad for -- for he and his wife taking the time
5 to come down and share their concerns.

6 I don't believe that, you know, what --
7 what appears to be the Board's decision should
8 necessarily be taken as a statement that there might
9 not be some discomfort that you experience by virtue
10 of the existence of a new deck or by virtue of just
11 the way your property is situated in the context of
12 the neighborhood where -- where you've chosen to make
13 your home.

14 To the extent that it's necessary, I'll
15 speak a little bit about my own personal experience
16 which is somewhat similar to yours in terms of the
17 layout of the rear of my property and what I deal with
18 in terms of the back bedrooms of my own residence
19 relative to the vicinity of other residences and I --
20 and I too am a resident on Capitol Hill.

21 So, I understand the concerns and I think
22 my colleagues understand the concerns that -- that you
23 express, but I do agree with Mrs. Miller as it relates
24 to the issue of sun. I think the -- the overhead
25 photographs that are included in the Office of

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1 Planning's report are very illustrative of what the
2 circumstances are with respect to sun and light in
3 your immediate neighborhood.

4 It's fairly clear that you're going to get
5 substantial shadows from a number of different
6 directions both to the east and perhaps even to some
7 extent depending on the time of day from some of the
8 properties that are -- that are -- I'm sorry, from the
9 west and potentially given the time of day, you may
10 also get some additional sun coming from some of the
11 properties that are in your same line based on where
12 the sun -- sun is perched. I don't -- I just don't
13 see that the deck is going to exacerbate that. I
14 believe the photos in attachment three and attachment
15 four already demonstrate some fairly substantial
16 shadows that come from some of the buildings that
17 front on 4th Street, N.E.

18 I think with respect to the issue of
19 privacy I think that was the biggest concern for me
20 and -- and one of the more compelling aspects of -- of
21 your presentation, but I would also again agree with
22 my colleague Mrs. Miller and my other colleagues with
23 regard to just the orientation and the situation of
24 these properties as row properties.

25 It is to an extent something of a fact of

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1 life that the closeness and the proximity and the
2 adjacency of these properties are one that oftentimes
3 give themselves to perhaps having to put up with a
4 little more noise and a little more of the urban feel
5 if you will than a stand-alone dwelling might have to
6 deal with in another particular area. We just live in
7 that kind of proximity and I, too, share that kind of
8 situation in my own personal experience in the
9 neighborhood where I reside.

10 The security issue that you raised, too,
11 is a very practical consideration, but I don't think
12 it's one that's necessarily exacerbated by the
13 existence of the deck. I think the Chairman's
14 questions were very instructive with regard to
15 unfortunately any creative person who desires to do
16 some ill will in terms of violating your property
17 rights or the property rights of any of your neighbors
18 could utilize your roof, could utilize a ladder in
19 very quick and underhanded means to access your
20 property through any of your windows.

21 It is indeed a shame that we all have to
22 give consideration to security measures like gates and
23 screens and things along those lines, but that too is
24 something of -- of a fact of life in an urban setting
25 that I don't think is exacerbated by the introduction

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1 of -- or the reintroduction of the deck to -- to your
2 neighbor's property.

3 So, in short, I think the outcome is a
4 right one, but I just wanted to be sure and I'm sure I
5 speak for my colleagues when I say thank you for your
6 time for coming down here. It's probably not the
7 outcome that you desire, but I -- I am hopeful that
8 you understand the Board's reasoning.

9 And I'll also note just on the issue of
10 the screening that I do tend to agree with my
11 colleagues. I know we had a case in the past where
12 the Office of Planning did suggest some screening.
13 That circumstance was somewhat different, but I am
14 sure that I haven't heard anything at Mr. Murphy's
15 presentation that would suggest that there is not a
16 willingness for neighbors to build on the congeniality
17 that I've heard here.

18 Mr. Nejad has clearly said this is not a
19 personal issue here. So, I am very hopeful that in
20 the spirit of that -- of that testimony there will be
21 ample consideration given on the part of both members
22 of the community to addressing any concerns.

23 You know, if it's not a full-fledged
24 screen, you know, there is perhaps some, you know -- I
25 mean I'll leave it -- I'll leave it at that, but I

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1 think that is something that can worked out in a -- in
2 a congenial fashion.

3 Thank you, Mr. Chair.

4 CHAIRPERSON GRIFFIS: Good. Thank you
5 very much. Well said. Ms. Miller, last word.

6 VICE CHAIRPERSON MILLER: Yes, I just want
7 to add to the variance analysis. With respect to the
8 uniqueness in this case and also the -- no substantial
9 detriment. I think it's important to bring out the
10 fact that this isn't a new deck that was being
11 requested for the first time. In this case, there
12 were two decks that had been there previously for over
13 20 years and in this case, we're talking about a
14 replacement for one of the decks that is smaller than
15 the footprint of that original deck. So, I think
16 that's an important factor.

17 And I just want to comment. The Board
18 isn't reaching the question of whether or not
19 applicant should be here anyway based on 2001.2. But,
20 I think to me it's not clear because this sounds like
21 a replacement and the words in 2001.2 talk about
22 ordinary repairs, alterations, and modernizations to
23 the structure including structural alterations.

24 So, I mean it's -- it's possible that it
25 could fit in there. It's possible not in my opinion.

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1 So, I think it's the right course of action that we
2 don't need to reach that since applicant has met the
3 variance test.

4 CHAIRPERSON GRIFFIS: Excellent. Thank
5 you very much. Anything further?

6 Being nothing further, we have a motion
7 before us. It has been seconded. Ask all those in
8 favor signify by saying aye.

9 (Ayes)

10 CHAIRPERSON GRIFFIS: And opposed?
11 Abstaining? Mr. Moy, if you wouldn't mind.

12 MR. MOY: Okay. Yes, the staff would
13 record the vote as 4-0-1. The is to approve the
14 application on the motion of the Chairman Mr. Griffis,
15 seconded by Ms. Miller. This also includes the
16 additional relief from 2001.3. Also in support of the
17 motion Mr. Mann and Mr. Etherly and we have no Zoning
18 Commission member participating.

19 CHAIRPERSON GRIFFIS: Excellent. Thank
20 you very much. Is there any other business for the
21 Board this morning?

22 MR. MOY: No, sir.

23 CHAIRPERSON GRIFFIS: Good. If there's no
24 further business, then prior to adjourning, let me say
25 Mr. McGettigan it's been a pleasure and let's take a

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1 break for some lunch. Let's come back at 1:45 Board
2 members and we'll convene in the afternoon session.

3 That being said, thank you all very much.

4 (Whereupon, the hearing was recessed at
5 1:01 p.m. to reconvene at 1:45 p.m. this same day.)
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20 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

21 2:12 p.m.

22 CHAIRPERSON GRIFFIS: Good afternoon,
23 ladies and gentlemen. Let us call this afternoon
24 session to order on the 15th of March 2005 of the
25 Board of Zoning Adjustment for the District of

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1 Columbia.

2 My name is Geoff Griffis, Chairperson.

3 Joining me today is the Vice Chair Ms.
4 Miller and also our mayoral appointee Mr. Etherly.
5 Representing the Zoning Commission with us this
6 afternoon is Mr. Hildebrand and representing the
7 National Capital Planning Commission is Mr. Mann.

8 A very good afternoon to all of you.

9 Copies of today's hearing agenda are
10 available for you.

11 We do have two cases scheduled for this
12 afternoon, but the public schedule is located where
13 you entered into the hearing room. We have a
14 continuation of appeal and we have a new appeal this
15 afternoon. So, I will get through my opening remarks
16 so we can go right to it and I'll give you a little
17 bit of estimated timing of which we will proceed with
18 this afternoon.

19 Several very important aspects to all
20 proceedings before the Board of Zoning Adjustment are,
21 first, all proceedings are recorded. They're recorded
22 in two fashions. First of all, we do have the court
23 reporter who is sitting on the floor to my right that
24 is creating the official transcript. Secondly, we are
25 being broadcast live on the Office of Zoning's

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1 website.

2 Attendant to both of those, we ask several
3 things.

4 First of all, when coming forward to speak
5 to the Board prior to addressing the Board, we will
6 need you to state your name and address for the
7 record. You will need to do that into a microphone.
8 The microphone should be on. But, if it isn't, I'll
9 remind you to turn it on.

10 Secondly, we would ask that everyone fill
11 out two witness cards. Witness cards should go to the
12 recorder prior to coming forward to speak so that we
13 can give all the testimony on the record credit to
14 those who actually say it and get your names spelled
15 correctly also.

16 I asked that everyone present turn off
17 their cell phones and beepers at this time so we don't
18 have a disruption of the proceedings and transmission
19 as we go forward.

20 The order of procedure for the appeal
21 applications are as follows. First, we hear
22 statements of the witnesses of the appellant.

23 Second, we'll hear from the Government's
24 case and the Zoning Administrator's representatives.

25 Third, we'll hear from the lessee or

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1 operator of the property.

2 Fourth, we'll hear from the ANC.

3 Fifth, we'd hear from any intervenor cases
4 that have been established by the Board.

5 Sixth, we'll hear rebuttal and closing
6 statements by the appellant.

7 Cross examination of witnesses is, of
8 course, allowed by the appellant, appellee, and any
9 intervenors that are established in the appeals cases.

10 We'll be very clear on who that is and how that is to
11 be conducted.

12 Nothing precludes this Board from setting
13 limits on cross examination questions and time.
14 Obviously, those limits would be based on the -- being
15 germane and jurisdictional to the Board and keeping to
16 the scope of which the appeal has already been set or
17 will be set depending on the case.

18 The record will be closed at the
19 conclusion of each case presentation before the Board
20 except for any material that the Board keeps the
21 record open for and we will be very specific as to the
22 material that is to be submitted into the record and
23 when it is to be submitted if it is, in fact, required
24 by the Board.

25 The Sunshine Act requires that this Board

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1 conduct all its proceedings in the open and before the
2 public. This Board may enter into executive session
3 both during or after any proceeding on a case and that
4 would be for the procedure of reviewing the record
5 and/or deliberating on a case and that would also be
6 in accordance with the Sunshine Act and our rules,
7 regulations, and procedures.

8 We will make every effort to conclude at
9 some point today which brings me to the question of
10 schedule.

11 We have a continuation of appeal that's
12 started. We have a second appeal that's being called.

13 It is my estimation at this point that we
14 would call the second appeal sometime between 5:30 and
15 6:00 this evening. The Board has indicated that they
16 would stay long enough to get well into the appeal if
17 not hear the entire case of the appeal, but I want to
18 inform you of that so you're not expecting it to be
19 called at 3:00 and maybe can accommodate other
20 people's schedules.

21 I'm going to get to the last little bits
22 of it. I'd like to take up as a preliminary matter in
23 the second if there's any scheduling problems with any
24 of the participants or proposed participants in the
25 second appeal to that matter and then we get right

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1 into the first scheduled on the agenda today.

2 So, going to preliminary matters,
3 preliminary matters are those which relate to
4 whether a case will or should be heard today.
5 Requests for postponements, continuances, whether
6 adequate and proper notice has been provided, I'll
7 skip through a lot of this because I think it would
8 become evident as we get through it pretty quickly.

9 Let me ask and first say a very good
10 afternoon to Mr. Nyarku who is with the Office of
11 Zoning sitting at my far right. Mr. Moy also with the
12 Office of Zoning. A very good afternoon to you.

13 Representing the Office of Attorney
14 General is Ms. Monroe with us.

15 Mr. Moy, any preliminary matters for the
16 Board's attention today?

17 MR. MOY: Yes, Mr. Chair, but I think we
18 can handle it as a case by case.

19 CHAIRPERSON GRIFFIS: Excellent. And
20 let's swear people in then. People that have not been
21 sworn in previously or that are planning to testify
22 today before the Board, I'd ask you if you would
23 please stand and give your attention to Mr. Moy. He's
24 going to administer the oath and then we'll take up
25 any preliminary matters.

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1 MR. MOY: Do you solemnly swear or affirm
2 that the testimony you are about to give in this
3 proceeding is the truth, the whole truth, and nothing
4 but the truth? Thank you.

5 CHAIRPERSON GRIFFIS: Good. Thank you all
6 very much.

7 Is there any questions from the second
8 appeal on the day? Yes.

9 Actually, I'm sorry. I just need you to
10 come forward. You're going to need to state your name
11 and address for the record and more importantly, I
12 need you to speak into a microphone.

13 MR. GOLDBERG: Roy Goldberg for the
14 appellant.

15 CHAIRPERSON GRIFFIS: Could you just touch
16 that?

17 MR. GOLDBERG: It's on.

18 CHAIRPERSON GRIFFIS: Perfect.

19 MR. GOLDBERG: Roy Goldberg, Sheppard,
20 Mullin, Richter & Hampton for the appellant Eastern
21 Trans Waste Of Maryland.

22 CHAIRPERSON GRIFFIS: Yes.

23 MR. GOLDBERG: Just to report we are here.
24 We're ready to proceed. We appreciate the ability to
25 get on today. We have witnesses coming from as far as

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1 at least 200 or 300 miles away that have come into
2 town. So, we appreciate the indulgence and to try to
3 if at all possible certainly start and complete --

4 CHAIRPERSON GRIFFIS: They coming from up
5 north or down -- no, it doesn't matter honestly.

6 MR. GOLDBERG: Not -- not eastern. That's
7 for sure.

8 CHAIRPERSON GRIFFIS: Okay. Right.

9 MR. GOLDBERG: Not from the water, but so,
10 we appreciate the indulgence and we'll be ready to
11 proceed when the panel's ready.

12 CHAIRPERSON GRIFFIS: Good. I appreciate
13 that and as I say, you know, if there are other things
14 that you want to do. You want to sit, obviously,
15 we're going into an appeal right now, that would be
16 fine. Totally up to you. We will find you or you can
17 leave a note of where you are to be found if we get --
18 if you -- if you decide to leave, but I would not
19 anticipate anything before 5:00 today.

20 MR. GOLDBERG: We'll keep our fingers
21 crossed.

22 CHAIRPERSON GRIFFIS: Indeed.

23 MR. GOLDBERG: Thank you.

24 CHAIRPERSON GRIFFIS: With that then if
25 there's nothing else for the Board's attention, let's

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1 get right into this and -- and move ahead.

2 Mr. Moy, if you wouldn't mind calling the
3 first case in the afternoon.

4 MR. MOY: Yes, sir, as you said, this is
5 an appeal case that's continued from March the 1st and
6 this is the Appeal Number 17285 of Patrick J. Carome
7 pursuant to 11 DCMR 3100 and 3101 from the
8 administrative decision of the Zoning Administrator of
9 the Department of Consumer and Regulatory Affairs.
10 The appellant alleges that the Zoning Administrator
11 erred by issuing a building permit which is Number B
12 as in Bravo 460927 dated April 23rd, 2004 allowing the
13 construction of a masonry retaining wall serving a
14 single-family detached dwelling. The appellant
15 contends that the retaining wall violated the Zoning
16 Regulations, including the side yard requirements
17 under section 405, rear yard requirements under
18 section 404, and structures in open space requirements
19 under section 2503. The subject premise is located
20 within the Tree and Slope/Wesley Heights/R-1-A
21 District and is located at 4825 Dexter Terrace, N.W.
22 That's in Square 1381, Lot 806.

23 As I said earlier, the -- this appeal was
24 originally heard March 1st. The Board acted on
25 preliminary matters at that time. What's before the

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1 Board now are arguments from all the parties beginning
2 with the appellant.

3 Finally, Mr. Chair, just want to alert the
4 Board that since March 1st, there have been additional
5 filings into the record.

6 First is the filing dated March 14th from
7 or rather -- yes, March 14th from the appellant and
8 that's in your case folders as Exhibit 47 and 48.

9 We also have a filing from the intervener
10 representing the property owner which is in your case
11 folders identified as Exhibit 49. In that exhibit --
12 there are two motions within that exhibit. First,
13 objecting to the filing of the appellant for lack of
14 timeliness and second, a request to continue the case
15 if the filing is accepted into the record.

16 Finally, the last filings are from the
17 other intervener in the case, the National Park
18 Service which is in your case folders identified as
19 Exhibit 50 and 51.

20 And that completes the staff's briefing,
21 Mr. Chairman.

22 CHAIRPERSON GRIFFIS: Good. Thank you
23 very much. Mr. Aguglia, do you want to speak briefly
24 like one minute on your motion?

25 MR. AGUGLIA: Yes, Richard Aguglia

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1 representing the property owners with the law firm of
2 Hunton & Williams.

3 I'm withdrawing my request for a
4 continuance because having read volume four of -- of
5 the Carome submittal, I believe it reinforces our
6 position.

7 However, I would like to have the record
8 open so I can at least have a written statement in
9 opposition to it I think as a courtesy since I didn't
10 get it until yesterday afternoon.

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. AGUGLIA: All right. Second, I'm --

13 CHAIRPERSON GRIFFIS: Let me -- let me ask
14 you on the first motion and then the substantive piece
15 and let me be straight with you. I don't think the
16 Board has entirely read all of it as we were delivered
17 some of it late last night to our homes, but is it
18 your understanding that -- that most of this is more
19 of legislative history and -- and legal briefing on
20 this issue?

21 MR. AGUGLIA: Correct.

22 CHAIRPERSON GRIFFIS: And would you not
23 then -- I understand you're requesting to keep the
24 record open, but would it not also be appropriate in
25 -- in perhaps even your findings and conclusions draft

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1 summations at the end of this, it might be able to be
2 incorporated.

3 MR. AGUGLIA: Yes.

4 CHAIRPERSON GRIFFIS: Okay.

5 MR. AGUGLIA: Yes, that's true, but I
6 would still like the opportunity --

7 CHAIRPERSON GRIFFIS: Sure.

8 MR. AGUGLIA: -- to separate it out.

9 CHAIRPERSON GRIFFIS: Indeed.

10 MR. AGUGLIA: Because I believe it
11 supports my position and (b) the statute is so clear
12 on this. Just reinforces the issue.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. AGUGLIA: Okay. So, then I have a
15 second point. I was just given as I walked into the
16 building the latest submission from the Park Service
17 dated today.

18 CHAIRPERSON GRIFFIS: Good. We're --
19 we're a couple of hours ahead of you on that one.

20 MR. AGUGLIA: I did not receive it until
21 roughly 12:30ish when we got to the building. All
22 right.

23 I -- I have object because of the late
24 filing. If you are inclined to accept it, then I must
25 have the right to bring in -- there are -- there are

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1 significant misstatements here.

2 First of all, I note that while there's a
3 cover letter from Sarah Blumenthal as the Regional
4 Director, there is no signature on it as to who
5 prepared the document. So, I'm not even sure who
6 prepared the document, but there are such significant
7 mistakes here that I must have the right to call our
8 expert engineer in to rectify the situation.

9 He is in Pennsylvania. He's not available
10 today. I didn't intend to put him on the stand today
11 because I wasn't aware that this was going to be filed an
12 hour before the hearing.

13 So, that's where I'm at on the -- the
14 latest Park submissions or submittal.

15 CHAIRPERSON GRIFFIS: Okay. And I
16 understand the two -- the second point, I absolutely
17 concur with. The first point, I'm not sure I
18 understand. Why would you not think that this is the
19 Park Service's work or are you saying it has to be
20 established that it is Ms. Blumenthal's individual
21 work and why would that make any difference to us?

22 MR. AGUGLIA: Well, in order for this to
23 have any credibility, it would have to have been
24 prepared by an engineer who understood the engineering
25 concepts.

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1 CHAIRPERSON GRIFFIS: I see your point.
2 Even -- even within the Park Service, who -- who came
3 up with this fairly expert analysis.

4 MR. AGUGLIA: Exactly. And my guess is
5 that Ms. Blumenthal is not that person.

6 CHAIRPERSON GRIFFIS: Gotcha. And
7 certainly in the cross examination of the presentation
8 of their case, that's a question that you could raise.
9 Correct?

10 MR. AGUGLIA: Yes.

11 CHAIRPERSON GRIFFIS: Okay. Good. Any
12 other concerns?

13 MR. AGUGLIA: Not at this time. Okay.

14 CHAIRPERSON GRIFFIS: So, it's still
15 twofold in terms of the U.S. Department of Interior.
16 You would either have us strike it or keep the record
17 open for your opportunity to address?

18 MR. AGUGLIA: To address and by the
19 presentation of a witness.

20 CHAIRPERSON GRIFFIS: Right. Okay. Yes.

21 MR. CAROME: I have no objection to Mr.
22 Aguglia's request to submit a written response to what
23 I filed yesterday whether it's in the form of his
24 proposed findings of fact and law or otherwise.

25 CHAIRPERSON GRIFFIS: Okay. Any opinion

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1 on the Department of Interior Park Service motion?

2 MR. CAROME: I -- I would suggest that
3 perhaps the Park Service counsel who I know is here
4 might -- might want to respond, but I don't have a
5 response. No.

6 MR. MURPHY: Good day, Mr. Chairman. My
7 name is David Murphy. I'm representing the National
8 Park Service.

9 CHAIRPERSON GRIFFIS: Um-hum.

10 MR. MURPHY: As to the preparation of the
11 document, Ms. Sarah Blumenthal was the Acting Regional
12 Director at the time of the -- the conveyance of this
13 document.

14 CHAIRPERSON GRIFFIS: Yes, but did she
15 compile this information, draw these analysis and
16 conclusions?

17 MR. MURPHY: No, we didn't -- no, she did
18 not. However, these are not engineering calculations.
19 These are simply --

20 CHAIRPERSON GRIFFIS: Okay. Right.

21 MR. MURPHY: -- quotes from the insuring
22 documents.

23 CHAIRPERSON GRIFFIS: Without going into
24 -- who did it?

25 MR. MURPHY: This was done by staff work,

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1 professionals and legal advisors to the National Park
2 Service.

3 CHAIRPERSON GRIFFIS: Okay. Good. We'll
4 leave it at that. Is there any opinion on the motion
5 to allow the property owner's representative to have
6 the record kept open for their submissions in rebuttal
7 to this? Any objection to that?

8 MR. MURPHY: No, we do not object.

9 CHAIRPERSON GRIFFIS: Does the ANC have
10 any objection to that? Do any of the others? Have I
11 missed anybody? Refreshing my recollection here.
12 Does the DCRA have any objection? That's right.
13 You're part of this. Aren't ya?

14 MS. BELL: Yes, the government.

15 CHAIRPERSON GRIFFIS: This whole cast of
16 characters over here. Where's the government anyway?
17 Okay.

18 MS. BELL: Good afternoon. Good
19 afternoon. Actually, the government is in the same
20 position as -- as Mr. Aguglia.

21 CHAIRPERSON GRIFFIS: Okay.

22 MS. BELL: We just received this upon
23 walking in today. We haven't had an opportunity to
24 review it and it does contain -- without making --
25 without making any comments with regard to the fact,

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1 it -- it does contain, you know, substantive
2 conclusions which we would need to address at another
3 point.

4 So, we would like the record to remain
5 open so that we can have an opportunity to review it
6 later and provide some response if need be.

7 CHAIRPERSON GRIFFIS: Great. Okay. And I
8 think obviously anything we afford Mr. Aguglia the
9 opportunity, we afford everybody the opportunity. So,
10 we'll get that into the schedule of submissions as we
11 move forward.

12 Let's -- I think that's fairly decided
13 unless there's any opposition from the Board members
14 in -- in allowing the record to be kept open for
15 responses to the Park Service letter. Obviously,
16 they'll be open for cross examination and the
17 presentation of their case. This may well be part of
18 it, but not necessarily all together if we get to this
19 today.

20 Any objection to proceeding in this
21 fashion? In which case, let's move ahead and I don't
22 think that there's any other preliminary matters.

23 Ms. Miller, comment.

24 VICE CHAIRPERSON MILLER: Just -- just for
25 housekeeping purposes, then as I understand it, the

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1 motion for a continuance has been withdrawn and the
2 motion for an opportunity to respond in writing to the
3 appellant's latest supplemental brief is granted. Is
4 that correct?

5 CHAIRPERSON GRIFFIS: Sounds good to me.

6 VICE CHAIRPERSON MILLER: Okay. Sounds
7 good to me. Okay.

8 CHAIRPERSON GRIFFIS: Everyone understand
9 the same? Good. Very well. An excellent point to
10 bring up.

11 Now, the second piece, we're ready to go
12 -- move ahead with the appellant's case. We'll then
13 hear DCRA's case, property owner's case. We'll hear
14 from the ANC and we'll go to the intervener and
15 rebuttal closing.

16 You've been limited to 30 minutes. The
17 clock is going to be on. It's on both sides. I have
18 it in front of me. If there's interruption for a
19 Board question, that obviously doesn't count towards
20 your 30 minutes.

21 If you don't see the clock stop when a
22 Board question comes in, I want you just to keep
23 going. I will keep track of it and make sure that
24 time is added back on.

25 Once 30 minutes is up, we'll move to cross

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1 examination. Cross examination, of course, is not
2 times. I will keep people on point and fairly
3 expeditious in their questions and answers.

4 You guys are all attorneys. So, you know
5 it better than I do, but I will also just intervene if
6 need be.

7 If that's clear, are you ready to proceed?

8 MR. CAROME: Yes, I am.

9 CHAIRPERSON GRIFFIS: Excellent. In which
10 case, let's move ahead.

11 MR. CAROME: Thank you and good afternoon.

12 I'm Patrick Carome of the law firm of Wilmer, Cutler,
13 Pickering, Hale & Dorr. I'm the appellant in this
14 matter.

15 Just as a quick preliminary matter, I'd
16 like to adopt the submissions of all of the letters in
17 the file that have been submitted in favor of the
18 appeal. I would note that on the docket sheet a
19 number of letters that are, in fact, in favor of the
20 appeal are, I think, incorrectly indicated as being
21 opposed to the appeal.

22 I'm speaking specifically about the ones
23 I'm adopting are BZA Exhibits 19, 25, 30 of the Sierra
24 Club, 33 of the Palisades Citizen Association, 38, 39,
25 44 and a number that are also in 85 of my volume three

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1 which is BZA Exhibit 34 including the statement of the
2 Morrisons.

3 On the merits, I'm going to turn right to.

4 There are -- there are five points that I'd like to
5 present this afternoon. I have a -- a one-page
6 bulleted -- five-bulleted handout which I was going to
7 use as a blowup, but I would suggest perhaps if I
8 could just hand that out --

9 CHAIRPERSON GRIFFIS: Good.

10 MR. CAROME: -- to the Board members, that
11 might help as we follow along.

12 CHAIRPERSON GRIFFIS: I'm sorry. Want to
13 go straight down here. Hand it to staff, Mr. Nyarku,
14 who will put it in as an exhibit and hand it to the
15 Board, but you should proceed.

16 MR. CAROME: First let me begin by a quick
17 overview of what the structure is that is at issue
18 here.

19 CHAIRPERSON GRIFFIS: It all needs to go
20 there.

21 MR. CAROME: I'm going to refer to the
22 model here and these photos as well as photos in -- in
23 my exhibit book.

24 The -- I think it's really important that
25 we understand at the outset exactly what this -- this

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1 thing is that's at issue here.

2 It is an enormous nearly 400 foot --
3 nearly 400 feet long wall that is 30 feet high at it's
4 -- at least 30 feet high at its highest point and it
5 is supporting and surrounding substantially more than
6 a quarter acre elevated terrace.

7 Using the model, what you see here in the
8 model before you is the preexisting state of the
9 property before this project was done. You see that
10 this -- the -- the property slopes substantially
11 downward from Dexter Terrace towards Wesley Heights
12 Park or Acclamation Park at it's rear. It was
13 previously occupied by a -- by a small -- smaller
14 house and it was heavily treed in the backyard. In
15 fact, the aerial photos that the Park Service I
16 believe is going to present to you will show that it's
17 very difficult to even have found the house from --
18 from the aerial shots amongst all of the trees in the
19 -- in the backyard.

20 The -- what happened is that in -- in --
21 as part of this project all of the trees were cleared
22 and then in -- starting in 2004, this structure which
23 is -- which the permit referred to as a retaining
24 wall, but which I will discuss today as being much
25 more than a retaining wall. It is, in fact, a -- it

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1 does have a wall on the outside, but it is a -- an
2 enormous more than -- more than a quarter acre terrace
3 that was previously where the air and the trees was
4 that has now been erected in the backyard of the
5 house.

6 Let me just put it in here. It's right
7 there and it was done after the new house was -- was
8 put there. So, that's -- that's now what we -- what
9 we have there. This has recently been carpeted with
10 sod.

11 The -- the location is extraordinary.
12 It's -- it's right up against the property lines and I
13 -- I covered this up too soon, but the -- it's -- it's
14 also obviously covering the -- virtually the entire
15 rear required yard and substantial portions of both of
16 the side required yards. The -- and it's again right
17 up against the property.

18 These trees also have to come down because
19 a substantial amount of -- of trees have been lost
20 through that area as well here through the
21 construction activity and other -- and other damage.

22 The permit application said it was just
23 going to be made out of mesa block. In fact, it's --
24 it's much more than mesa block. Mesa blocks are these
25 large masonry blocks which make up the -- the wall

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1 itself, but a key structural element of the structure
2 is something known as geo-grid which is a high tension
3 fabric material which runs horizontally. It's
4 attached literally to the brick and it runs
5 horizontally away from the brick wall and -- and into
6 -- horizontally into the -- into the structure.

7 There are some 20 layers of such geo-grid
8 fabric. They extend back anywhere from 13 and a half
9 feet to 27 feet according to Exhibit 24 which is the
10 engineering diagram for drawings and plans for the --
11 for the property.

12 The -- just to -- that drawing, what is --
13 what is shown there in green is the geo-grid that is
14 extending backwards. The -- the dimensions there have
15 been taken off of Exhibit 24 to show the geo-grid.
16 The exterior around there obviously is -- is the wall.

17 That's Wesley Heights Park and neighboring property
18 right along here and right along here.

19 The -- just to -- the -- the wall -- the
20 model shows sort of the interior of the structure and
21 so, what you have here -- I've -- I've just -- in --
22 in this model here, you can see the representation of
23 what the geo-grid is -- is like. It is these large
24 sheets of material, porous, with holes in it, but they
25 extend backwards. It is the geo-grid, in fact, which

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1 is really keeping the wall from falling down away from
2 the terrace in many respects. It all sort of holds
3 together the material.

4 So, and so, the wall -- just to be clear,
5 this is the wall and there's obviously this huge
6 cavity that is here. The terrace with the geo-grid
7 running through it as in that drawing is here.

8 So, it's -- it really has two components
9 to the structure. It's the -- excuse me. It's the --
10 it's the wall plus -- plus the terrace.

11 So, let me first -- now, there's -- there
12 are many reasons why this structure violates the D.C.
13 zoning code and there are many stated in my original
14 appeal. There -- there are many more stated in the
15 papers that I'm afraid I've burdened the -- this
16 panel, but I'm going to focus on just five of them
17 today and they're the five that are listed on the
18 sheet that I -- that I handed out.

19 The first is the Wesley Heights Overlay
20 and it's general purposes and this was a defect. This
21 defect in the challenged DCRA permitting decision is
22 one essentially that -- that the DCRA failed to apply,
23 the Wesley Heights Overlay. This was a serious defect
24 both in procedure and in substance.

25 Procedurally, it is apparent that DCRA did

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1 not even consider the Wesley Heights Overlay in its
2 decision.

3 Why -- why do I say that? When the DCRA
4 correctly applies an overlay, its general practice is
5 to note the initials of the overlay district both on
6 the top of the permit application and on the permit
7 itself. In this instance, neither of those things
8 were done. Exhibit 51 is the permit application.
9 Ordinarily, on the first page of that at the very top,
10 there would be a designation of Wesley Heights
11 Overlay. There is not. Exhibit 52 is the permit
12 itself. On that, there is no reference to the Wesley
13 Heights Overlay.

14 Interestingly enough, all of the other
15 permits -- permit applications and permits that were
16 issued in connection with this property did bear those
17 notations of the Wesley Heights Overlay on the page
18 one and the Wesley Heights Overlay reference on the
19 permit itself. Not here.

20 Substantively, I submit that it is obvious
21 from the fact that this structure was allowed to be
22 put up that the DCRA could not possibly have applied
23 the Wesley Heights Overlay because this structure is
24 so fundamentally at odds with the purpose of the
25 overlay and it's terms.

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1 The key purposes of the Wesley Heights
2 Overlay are to preserve and enhance the density, the
3 below density character of Wesley Heights, the
4 preserve existing trees, access to air and light, and
5 to preserve the harmonious design and attractive
6 appearance of the neighborhood.

7 The photos in the record make it
8 abundantly clear that the massive wall structure
9 violates these proposes, in its size, in its location,
10 and in its appearance. I would refer in particular to
11 Exhibits 29, 30, 32, 35, 36, 40, and 44. Those are
12 all in my exhibit volumes.

13 Obviously, it greatly increases the
14 density of -- of building structures in this area. It
15 has created an enormous tree-free zone where a dense
16 forest previously flourished. At least 15 major trees
17 were destroyed in -- in the construction of this
18 according to the Park Service evidence that you'll see
19 and those trees actually cannot grow back because this
20 has now been heavily compressed land here and -- and
21 fill material and geo-grid material that this platform
22 is made up of and I think you'll hear testimony from
23 the Park Service today indicating that the trees
24 cannot grow there. Certainly, not the substantial
25 trees that were there in this area because of the --

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1 the geo-grid and other compaction of the -- of the
2 platform.

3 It also cuts off massive amounts of light
4 and air and it could not be less harmonious with its
5 park land surroundings.

6 Statements from the neighbors that are in
7 the record say it all. One neighbor called this a
8 piece of public park land to be enjoyed by walkers and
9 nature lovers, but it has -- it has now been
10 mutilated. Another neighbor called it -- that it
11 looks like a battleship. Another neighbor says that
12 it looks like an aircraft carrier run aground in the
13 park. Another area neighbor has said that it's an
14 eyesore that mocks the law and that it saps air and
15 light from the park. Another neighbor who had lived
16 -- who has lived in the neighborhood for -- for 18
17 years says in -- in 18 years of living in Wesley
18 Heights, I have yet to see a more offensive structure.
19 Those are all in the record.

20 This Board should rule that the structure
21 at issue violates the Wesley Heights Overlay and it
22 also should take the Wesley Heights Overlay into
23 account in strictly construing the other zoning
24 provisions that are at issue in this case and for that
25 proposition in terms of taking the zoning -- the

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1 overlay purposes into account and -- and the other
2 aspects, the other issues in the case. I would cite
3 the BZA case of appeal of Saylor, Appeal Number 17054-
4 A decision of October 5th, 2004.

5 My second argument is that the -- that the
6 walled platform structure violates the zoning codes
7 general prohibition in section 2503 on structures in
8 required rear yards.

9 Section 2503 is clear and straightforward.
10 Required rear yards -- required yards both rear and
11 side must be completely free and clear of all
12 structures from the ground up subject to very limited
13 exceptions.

14 This structure clearly violates section
15 2503. It obliterates nearly all of the 25 foot
16 required rear yard that -- or what's under here and it
17 -- and it also covers over very substantial portions
18 of the required eight foot side yards and the
19 structure plainly does not fit within any of the very
20 narrow and limited exceptions to section 2503.

21 Now, the DCRA and the Econimedes have
22 placed all of their eggs in one exception to 2503.
23 They've -- they've put their eggs in the basket of
24 2503.3 which permits "fences and retaining walls
25 constructed in accordance with the D.C. building

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1 code." That position hinges entirely on two false
2 premises.

3 First they make the -- the obviously false
4 assertion that this -- this whole structure is just a
5 retaining wall. I submit that it clearly is not just
6 a retaining wall. It is -- it is a retaining wall or
7 a wall and I think there are issues about whether it's
8 a retaining wall, but the important thing is that it's
9 not just the wall. It is also this enormous quarter
10 acre compacted geo-grided platform structure.

11 Now, the second assertion that they make
12 which is completely false is that -- their position is
13 that as a matter of D.C. law there is absolutely no
14 limit on how high anyone can -- can build a retaining
15 wall around the perimeter or his or her property.

16 These positions are both plainly wrong for
17 a host of different reasons.

18 In the first place, there -- as I noted
19 before, there is a substantial issue whether even the
20 wall, even the exterior wall component of this
21 structure is a retaining wall. I think a fair
22 argument can be made that the wall here is not a
23 retaining wall because it is not retaining something
24 that was there before. Instead it is -- it is holding
25 up what I believe is on the order of 6,000 cubic yards

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1 of fill material, rocks, soil, other material, and
2 geo-grid that have been trucked in from -- imported in
3 from completely different locations that were not
4 previously there.

5 Even if the exterior wall is a retaining
6 wall, even if you accept that, the wall I submit is
7 just the tail wagging the dog. The most significant
8 component of this structure is not the wall or the
9 walls, but rather the enormous elevated platform or
10 terrace that now occupied thousands of cubic feet that
11 were previously nothing but air and trees.

12 I would also note that the -- the fill is
13 as much holding up the wall as the wall is retaining
14 the fill and for that, I would just refer the panel to
15 Econimedes Exhibit E at page nine which is a group of
16 photos which the Econimedes submitted. That's --
17 that's their submission at BZA Exhibit 31.

18 There can be no doubt that the elevated
19 platform structure, this part of this structure, meets
20 the zoning codes definition of a structure in its own
21 right. The code defines structure as follows:
22 "Anything constructed including a building the use of
23 which requires permanent location on the ground or
24 anything attached to something having a permanent
25 location on the ground" and then the code goes on to

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1 give some examples including and it says "These
2 include among other things radio and television
3 towers, reviewing stands, platforms" which I find to
4 be very important here "flagpoles, tanks, bins, gas
5 holders, chimneys, bridges, and retaining walls."

6 So, both retaining walls and platforms are
7 specific examples of structures under the code.

8 Now, the term -- the term platform --
9 well, first of all, this platform part of this
10 structure clearly meets both of the alternative prongs
11 of the definition before you even get to the examples.

12 First, it is constructed. It is a manmade
13 and built up thing that has been built up from various
14 imported materials of different sorts, the fill, the
15 geo-grid, et cetera.

16 Second, is attached to something having a
17 permanent location on the ground, the high tension
18 geo-grid fabrics which run deeply into the platform
19 structure here are directly attached to the wall
20 structure which obviously is permanently affixed to
21 the ground.

22 The platform also fits neatly into one of
23 the expressed examples of structure in -- in the
24 definition of structure. Webster's Unabridged defines
25 platform as "a natural or constructed terrace."

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1 Webster's defines terrace as "a relatively level paved
2 or planted area adjoining a building." It also calls
3 -- defines it as "a raised embankment with a top
4 leveled for walking" and as a "horizontal or gently
5 sloping ridge made in a hillside."

6 I don't think it could be any clearer that
7 this is a platform or terrace. That it's -- and it's
8 a structure and it, therefore, had to conform to the
9 zoning code.

10 If the Econimedes had filled the cavity
11 made up by this wall with -- instead of with this
12 multilayered fill and geo-grid, if they had instead
13 filled this up with, sorry, that cavity up with cement
14 and made a nice platform or put shuffleboard quartz on
15 top of it or something like that, no one would doubt
16 that the whole thing was structure. No one would say
17 well, aha, it's just the wall.

18 It's no different that they've used
19 imported fill and geo-grid to achieve the same -- to
20 achieve the same result.

21 The -- once this structure is properly
22 conceived of as being a wall plus a platform, it is
23 undeniable that section 2503 has been violated. The
24 platform -- the platform occupies virtually all of the
25 required rear yard and large portions of the required

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1 side yard.

2 Could -- could one of you flip down. The
3 green there is showing where the geo-grids are. This
4 -- when we flip this next down, it'll -- it'll show
5 how the -- how the platform. That's the elevated
6 surface of the platform. The same as this just turned
7 sideways. That it now sits on the -- on the property.

8 The -- it -- that platform does not meet
9 any of the exceptions of section 2503. It's not
10 within section 2503.2 because it has parts. Indeed
11 most of its parts that are more than four feet above
12 grade. That's an essential to meet 2503. It's not
13 within the retaining wall exception. The only thing
14 it could possibly fit into is the exception for
15 structures that are entirely below four feet -- do not
16 project above grade anymore than four feet and the
17 grade here, this is an important point that was
18 addressed in my submission yesterday, where is grade
19 measured from?

20 Grade for this purpose is the level of the
21 yard at the points where the structure is built. This
22 is spelled out clearly in the 1977 legislative history
23 of what -- what became section 2503 and -- and there
24 are figures at the back of my Exhibit A that show that
25 grade specifically is being measured in their examples

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1 from the point in the yard where the -- where the
2 structure is. I refer in particular to -- this would
3 be BZA Exhibit 48, my Exhibit A, that at the back of
4 that Exhibit A, there are -- there are several
5 drawings of what would and would not comply with the
6 -- this part of the code and there is one example
7 where clearly the measurement is being made from the
8 rear -- rear wall. The -- so, that's argument two.

9 Argument three is that the -- oh, I'm
10 sorry. The wall platform structure also violates the
11 prohibitions on structures that occupy more than 50
12 percent of a required yard. When 2503 was first
13 enacted, the definition of yard was revised to include
14 a new sentence stating that no building or structure
15 shall occupy in excess of 50 percent of a yard
16 required by this title.

17 Here, the platform structure clearly
18 occupies more than 50 percent of the required yard.
19 Indeed, it occupies approximately 94 percent of the
20 required rear yard. Everything but that little
21 triangle that's not covered up by the wall at all is
22 -- is occupied. Everything but that is -- is
23 occupied. So, 94 percent of the required rear yard
24 has been occupied and 60 percent of the required side
25 yard is occupied. The parts that aren't occupied are

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1 the parts up here and the part down in that corner,
2 but everything else is -- is completely occupied by
3 the -- by the platform.

4 Even if you ignored the -- the platform
5 and just looked at the geo-grid which is the dark --
6 the green material underneath, the -- the structure
7 still occupies more than the 50 percent allowed
8 portion of the required rear yard. Again, the only
9 parts that aren't occupied of the required rear yard
10 are that little corner there and a little bit here
11 where the geo-grid doesn't quite make it out to the 25
12 foot -- the 25 foot line and it also doesn't occupy
13 this portion here. But, even if you just forget about
14 the platform and just look at the geo-grid, you still
15 have a violation of the 50 percent lot occupancy
16 limit.

17 For much the same reasons, this is now my
18 fourth of five points, the wall platform structure
19 violates the Wesley Heights Overlay
20 prohibition on structures that occupy more than 30
21 percent of a lot. What the Wesley Heights Overlay
22 says quoting is "No structure including accessory
23 buildings shall occupy an area in excess of 30 percent
24 of a lot."

25 Again, the whole thing is a structure, the

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1 wall plus the platform. It occupies the area of the
2 lot shown in red there. That's the part of the
3 elevated terrace above what the preexisting grade was
4 and that amount of the -- by my calculations, that
5 area -- that red area there exceeds 14,000 square feet
6 and the total size of the lot according to the D.C.
7 tax records is 25,811 square feet and simple
8 arithmetic indicates that that is a 54 percent
9 occupancy of the lot with this wall platform
10 structure.

11 Actually, even if you just looked at the
12 -- they're just under the 30 percent by my
13 calculations. The -- just the geo-grided material I
14 -- I believe is -- approximately 28 percent of the lot
15 has been occupied by the wall plus the geo-grid that's
16 attached to the wall.

17 Lastly, and I want to make clear that I
18 know there was some concern at the last hearing about
19 whether I was relying on the -- on the building code
20 for parts of my argument and I -- I -- all of those
21 four arguments I have just delivered to you are purely
22 zoning code arguments. They're purely zoning code
23 arguments.

24 I'm now -- my last argument does in part
25 incorporate and draw on one aspect of the building

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1 code and that is even if we ignore all of the
2 foregoing points I've made and say that this is
3 nothing more than just the wall. It's just the wall.

4 Take this away. Pretend this isn't here. Pretend
5 it's just the wall. Even if we pretend that's all
6 that's here, there still is a serious violation of the
7 zoning code.

8 That is because most importantly I think
9 there are many violations of the -- of the building
10 code, but I'm only going to take your time up with one
11 here. There are others in my papers and that is that
12 this wall grossly exceeds the building code's seven
13 foot height limitation for fences, walls, trellises,
14 and screens that are located within ten feet of a
15 party line. It's clear from the plans that this is
16 within ten feet of the party line.

17 Where am I getting the -- where -- why am
18 I talking about the building code? I'm talking about
19 the building code because the -- the exception in 2503
20 for retaining walls specifies that only fences or
21 retaining walls that have been constructed in
22 accordance with the building code may go in a required
23 rear yard and so, that I submit requires as a matter
24 of zoning this panel and the zoning officials of D.C.
25 to for this limited purpose take into account the

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1 building code to assess whether or not the zoning code
2 -- whether the zoning exception has been satisfied.

3 It is obvious that this wall violates that
4 restriction. Every part of the wall is less than ten
5 feet from the party line. That's clear from Exhibit
6 23. That's clear from Exhibit 86 which is the
7 National Park Service survey which, in fact, shows
8 that at least part of the undergirding of the wall is
9 actually across the party line and it's clear from
10 Exhibit 45 which is my photos of the wall next to --
11 within inches of the National Park Service stakes that
12 are setting forth where the -- where the party line
13 is.

14 More than 300 feet of this approximately
15 400 feet wall are higher than seven feet above grade.

16 That's above -- again, that's above grade as measured
17 from the preexisting grade before the structure was
18 there.

19 Now, the Econimedes argue that no, grade
20 is suppose to be measured from up here. Somewhere up
21 in the front of the property and, therefore, the whole
22 thing is -- is below grade. They're absolutely wrong
23 about that.

24 The code says that the grade of a fence or
25 wall, the building code, is measured from the top of

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1 the fence to the grade on -- on whichever side the
2 grade is higher and here the -- the grade -- you got
3 to obviously look at the preexisting grade. The grade
4 was down here and when you measure up, you're -- as I
5 say, virtually, the better part of the wall violates
6 the seven foot height restriction.

7 Compliance with this height limitation is
8 a matter of zoning law that both the DCRA and this
9 Board are obligated to enforce. It is crystal clear
10 when the predecessor of section 2503 was first
11 codified in 1977, the Office of Zoning understood and
12 intended that the building codes height limitations on
13 fences and wall would be enforced as a matter of
14 zoning law. That again is -- that's the subject of my
15 memo that I submitted yesterday on the -- the
16 administrative and legislative history of the 1977
17 amendments.

18 The -- the Director of Municipal Planning
19 of the -- of the D.C. Municipal Planning Office at the
20 time of those amendments when -- when section 2503
21 came into law wrote a memo that is tab A to my
22 submission of yesterday explaining what -- how he
23 understood and how the -- the -- this was the
24 predecessor to the current Office of Planning, how it
25 was understood that the 2503 and the -- and the

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1 retaining wall reference to building code would be
2 interpreted.

3 And this is a quote out of that memo. "A
4 fence or retaining wall up to the height established
5 by the building code may be located in a side or rear
6 yard."

7 To treat the height limit of the building
8 code as beyond the purview of the zoning laws would
9 arbitrarily read out of existence eight key words of
10 limitation in section 2503.3. If the Econimedes were
11 right that there is no height limitation applicable
12 here, then they -- they will have produced or the law
13 will have produced an utterly absurd --

14 CHAIRPERSON GRIFFIS: Thirty seconds.

15 MR. CAROME: -- situation. That
16 specifically every person who owns a residential
17 property in D.C. would be under their interpretation
18 subject to having each of their neighbors on both
19 sides and in the rear erecting a wall of unlimited
20 height right up against their property lines and then
21 filling in behind those walls with landfill so as to
22 create a platform that towers over the lot below.

23 If they can do it, anybody can do it and
24 certainly anybody can do it, it's very easy to do, in
25 many of the places, the most pretty places and

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1 beautiful places in this city that are on -- on slopes
2 and that slope down towards park land. This -- this
3 would be disastrous for this city if the Econimedes
4 interpretation, DCRA's interpretation of their being
5 no height limitations on what can happen here were
6 true.

7 CHAIRPERSON GRIFFIS: Excellent. Thank
8 you very much. That's 30 minutes.

9 Questions from the Board? Ms. Miller.

10 VICE CHAIRPERSON MILLER: Does the
11 building code that's referenced in 2503.3 specify a
12 height for retaining walls?

13 MR. CAROME: The building -- well, the
14 building code specifies a height for fences, fence
15 walls, trellises, and screens and I would submit that
16 this is at least one or more of those things. It is
17 -- I think it clearly is a fence wall in that it is a
18 -- a wall that runs along the perimeter of the
19 property as a normal fence would do. It encloses the
20 property and it marks the boundaries to the property.

21 I think it also may well be a trellis in this notion
22 that's been introduced of its -- how they're going to
23 use it to hold up vines and the like.

24 To -- to suggest that you can put up a --
25 a 30 foot wall made out of mesa block and fill it in

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1 behind dirt and do that up to no height limitation --

2 CHAIRPERSON GRIFFIS: Right.

3 MR. CAROME: -- like this and -- and
4 whereas, you --

5 CHAIRPERSON GRIFFIS: Your answer to the
6 question is yes, the building code does, in fact,
7 stipulate a height.

8 MR. CAROME: Yes. I'm sorry. Thank you.

9 CHAIRPERSON GRIFFIS: Follow-up question?

10 VICE CHAIRPERSON MILLER: My next question
11 is I think you made a reference to building codes
12 saying where the grade is to be measured from. Do you
13 have a cite for that provision of the building code
14 that you're relying on?

15 MR. CAROME: Yes, I do. It's 12 DCMR
16 3110.1.3. I would also suggest that also highly
17 relevant to that question is the -- are the figures
18 attached to the 1976 memo at tab A of my submission
19 yesterday which actually shows how -- how measurement
20 from grade is being done for -- for these purposes
21 generally.

22 CHAIRPERSON GRIFFIS: But, you're point is
23 based on 3110.1.3 is that the grade is measured from
24 the preexisting grade.

25 MR. CAROME: Absolutely.

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1 CHAIRPERSON GRIFFIS: On each side of the
2 property line.

3 MR. CAROME: Whichever side is lower.
4 Exactly. That's correct.

5 CHAIRPERSON GRIFFIS: Okay. You actually
6 stated whichever side was higher I believe.

7 MR. CAROME: I'm sorry. I'm sorry.
8 Whichever -- whichever side is higher.

9 CHAIRPERSON GRIFFIS: Right. Indeed. Ms.
10 Miller, follow-up?

11 VICE CHAIRPERSON MILLER: One other
12 question. I think with respect to your argument about
13 the platform being formed, I understood part of your
14 reasoning to be that there was artificial material in
15 it that was trucked in, et cetera.

16 Would your argument be the same if it were
17 all dirt and natural material?

18 MR. CAROME: It would be -- obviously,
19 that's not what we're presented with here. I think
20 the argument would be the same if it's all trucked in
21 material. I think what's -- what's important here is
22 -- whether the wall is here or not, if -- if the -- if
23 someone manages to -- to build up a huge amount of
24 platform, earthen platform, right up against the --
25 the lot line. The -- the impact on -- on neighboring

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1 property is -- is the same whether -- either way and
2 clearly the purposes of the zoning code call for that
3 not to -- not to happen.

4 VICE CHAIRPERSON MILLER: Thank you.

5 CHAIRPERSON GRIFFIS: Any other questions
6 from the Board?

7 Ms. Miller, excellent questions. They all
8 go grade essentially. I mean I would say that's the
9 crux of your argument.

10 In terms of that, what is the basis
11 premise or are you saying that the overlay actually
12 precludes one from regrading the rear area of their
13 property?

14 MR. CAROME: To the extent one is building
15 a -- a platform that is higher than --

16 CHAIRPERSON GRIFFIS: Well, outside of the
17 platform. Let's start with the very basics.

18 MR. CAROME: Well -- well, I -- you're --

19 CHAIRPERSON GRIFFIS: Just -- just the
20 base regrading.

21 MR. CAROME: If -- I don't know where the
22 -- where the line is between simply landscaping and a
23 structure. There's no doubt that this -- that this
24 crosses it by a -- by a mile.

25 CHAIRPERSON GRIFFIS: Well, then you got

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1 to know where the line is if you know it crosses it.

2 MR. CAROME: Well, I would say that the
3 correct reading is -- is that in the 25 foot required
4 rear yard and in the eight foot required side yard you
5 cannot build up a -- a platform or -- or regrade above
6 four feet. Because you are at that point without a
7 variance. Because you are -- at that point, are
8 putting up a permanent structure right on your
9 neighbor's lot line.

10 CHAIRPERSON GRIFFIS: So, four feet above
11 the existing grade is your threshold.

12 MR. CAROME: That -- that comes from 2503
13 as -- as --

14 CHAIRPERSON GRIFFIS: No, I understand
15 where.

16 MR. CAROME: -- as the exception for
17 general sorts of structures that can be located in a
18 required rear or side yard. Nothing above -- that
19 projects above four feet above grade.

20 CHAIRPERSON GRIFFIS: Okay. And what --
21 what gives you the statement that the trees would not
22 be able to be grown in the backyard? Obviously,
23 you've gone through an awful lot on this grid system.
24 You're saying that the root structure wouldn't be
25 able to penetrate that grid system.

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1 MR. CAROME: Both because of the -- both
2 because of the -- the 20 layers of geo-grid material
3 in that area that is green on the -- on -- on the
4 drawing there and because all of this platform had to
5 be heavily compacted to a very, very high level of
6 compaction, this earth. It's not natural earth at
7 all. It's -- it's -- there had to be special
8 machinery and other things used to do that and I
9 understand that the National Park Service will offer
10 testimony establishing that --

11 CHAIRPERSON GRIFFIS: Okay.

12 MR. CAROME: -- no trees could grow there.

13 CHAIRPERSON GRIFFIS: Interesting
14 phraseology. What is natural earth? What was it?
15 Natural earth surface? Is it --

16 MR. CAROME: I just -- it -- this is --
17 natural ground is not compacted the way it had to be
18 compacted to make this structure work.

19 CHAIRPERSON GRIFFIS: Really.

20 MR. CAROME: This is quite an engineering
21 feat if done correctly.

22 CHAIRPERSON GRIFFIS: Okay. Other
23 questions? Mr. Mann.

24 MEMBER MANN: You state that this
25 retaining wall violates the Wesley Heights Overlay

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1 District, 1541.3.A which says "Preserve in general the
2 current density of neighborhood." How do you define
3 density?

4 MR. CAROME: Density here would be -- it's
5 to preserve the current density. So, density would be
6 in line with whatever the density is. Again, I --
7 this is -- I recognize a -- there's not going to be a
8 -- necessarily a bright line here, but I -- I submit
9 that wherever the line might be drawn, this massive
10 structure so greatly increases density that it -- it
11 crosses the line if there's one at all.

12 It's hard to think of a structure that
13 could -- could more offend the density principle.

14 MEMBER MANN: And you also say that it
15 cuts off massive amounts of light and air in violation
16 of the WH Overlay District. It's cutting off light
17 and air to -- to what?

18 MR. CAROME: To the park land below the --
19 below the structure is -- is actually completed
20 changed in its -- in its appearance and its quality.
21 The plant life appears to be dramatically impacted.
22 I'm told that -- that various kinds of plants that
23 used to grow there will -- will no longer grow there
24 because of the absence of light. It's completely
25 changed the entire ecosystem of this area of the park.

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1 MEMBER MANN: Were you limited just to the
2 park land?

3 MR. CAROME: Well, no, it's what concerns
4 me the most, but -- but it also dramatically affects
5 the neighboring property down here which -- which is a
6 private residence belonging to Danny and Tina Tate.

7 MEMBER MANN: Okay. So --

8 MR. CAROME: Who have submitted a letter
9 supporting the appeal.

10 MEMBER MANN: But, the argument is then
11 its -- its blocking the access to light and air which
12 is affecting biological or ecological systems not --
13 not other structures or residential units?

14 MR. CAROME: I think -- I think from the
15 Tate's letter, it is clear that it is blocking light
16 and air to their -- to their residence.

17 MEMBER MANN: And finally, you said that
18 it's not harmonious with the neighborhood and that's
19 -- you're speaking strictly from an aesthetic
20 viewpoint or --

21 MR. CAROME: It's more than aesthetic. I
22 mean it's -- certainly, it is aesthetic. I mean it --
23 I'd urge any of the Board members that haven't been up
24 to that part of town to see this to -- the pictures do
25 not remotely do justice to what this thing is and

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1 looks like.

2 CHAIRPERSON GRIFFIS: Well, we'll go when
3 this is all over.

4 MR. CAROME: But, it is more than
5 aesthetic. I mean there -- the -- the wildlife in
6 this area has completely changed. There's much less
7 wildlife. There are -- there are no longer deer in
8 the part as there were. A number of -- of things have
9 happened here and it's -- it's more than aesthetic.
10 It's environmental. It's -- it's extremely
11 destructive. The --

12 CHAIRPERSON GRIFFIS: You're saying
13 because of this wall there's no longer deer in the
14 park?

15 MR. CAROME: Yes.

16 CHAIRPERSON GRIFFIS: Is that what you
17 said?

18 MR. CAROME: Yes. Yes, I am because
19 there's a huge quantity of -- of trees. I'll urge you
20 to take a careful look at the aerial photos that I
21 believe the National Park Service is going to submit.

22 CHAIRPERSON GRIFFIS: So, the deer have
23 disappeared?

24 MR. CAROME: Yes, there was a family of
25 deer --

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1 CHAIRPERSON GRIFFIS: Well, that would
2 clear up another application we had in front of us
3 with that deer issue because they're no longer there.
4 Okay.

5 MEMBER MANN: Were -- were those 15 trees
6 that you said were destroyed, were those trees located
7 on the private property or on National Park Service
8 property?

9 MR. CAROME: Well, many of them were
10 certainly located on the private property here. Mr.
11 Econimedes is -- is under criminal prosecution now for
12 -- for felling six trees in the -- in the park land
13 property.

14 MEMBER MANN: Do you know how many of the
15 trees were located on the Econimedes property?

16 MR. CAROME: Pardon me?

17 MEMBER MANN: Do you know how many trees
18 were destroyed that were located on the Econimedes
19 property?

20 MR. CAROME: I don't, but I think that the
21 -- the Park Service may have specific testimony that
22 will help you on that.

23 MEMBER MANN: And so, you're saying that
24 the destruction of the trees clearly goes against in
25 your mind preserving existing trees as called for in

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1 the WH Overlay District?

2 MR. CAROME: Absolutely. I think this is
3 -- I -- I would be surprised if there was another
4 instance of the killing of trees in the Wesley Heights
5 Overlay in the history of the Overlay. This is an
6 extraordinary swath of trees that's been taken down.

7 MEMBER MANN: Thank you.

8 VICE CHAIRPERSON MILLER: Where's the
9 Tate's residence that you're referring to?

10 MR. CAROME: It is -- I'm not going to be
11 perfect with it, but generally, it's approximately
12 here.

13 VICE CHAIRPERSON MILLER: Okay. And is
14 there a letter in the record as some exhibit?

15 MR. CAROME: Yes, it is. The -- it is.
16 If you bear with me just one moment. It is Exhibit 39
17 to the BZA record and I mean they -- they point out
18 that -- that they no longer have a view of -- of the
19 park that they used to have from their -- interior of
20 their residence. I mean they -- they have a great
21 many concerns about it that are -- that are set forth
22 in -- in that exhibit.

23 CHAIRPERSON GRIFFIS: Is that our Exhibit
24 39?

25 MR. CAROME: Yes, I -- I have a copy of it

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1 that says Exhibit 39. There's also a copy of it at
2 Exhibit 85 of my third volume.

3 CHAIRPERSON GRIFFIS: That's more helpful.

4 Okay. Eighty-five and it shows -- it shows a
5 location map of some sort?

6 MR. CAROME: Oh, no, I'm sorry. It does
7 -- they do not show a --

8 CHAIRPERSON GRIFFIS: Do we have a map of
9 some sort?

10 MR. CAROME: I would point out that this
11 photo is taken from their backyard.

12 CHAIRPERSON GRIFFIS: Yes, that's nice,
13 but do -- we don't have any sort of graphic
14 representation of how far a distance it is?

15 MR. CAROME: I'm -- I'm sorry. I would be
16 happy to submit one into the record if -- if --

17 CHAIRPERSON GRIFFIS: That's okay. We'll
18 -- certainly, it's in here somewhere. Isn't it? I
19 thought I've seen it. Okay. Well, we'll get it if we
20 don't have it.

21 What's your estimation? I'm sorry if you
22 said this, but what's your estimation of distance?

23 MR. CAROME: I'm -- I'm sorry. I don't
24 have one.

25 CHAIRPERSON GRIFFIS: Okay. That's all

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1 right.

2 MR. CAROME: I mean their -- their
3 property --

4 CHAIRPERSON GRIFFIS: What do you know,
5 Mr. Mann?

6 MR. CAROME: -- their property borders --
7 their -- their backyard borders this. Comes up right
8 here.

9 CHAIRPERSON GRIFFIS: That's 39.

10 MEMBER MANN: The Tate's letter says ten
11 feet.

12 CHAIRPERSON GRIFFIS: Oh. Right. Right.
13 Right. See my orientation is -- is wrong. So, it
14 needs to be corrected. Okay. Well, we'll get to
15 that. Okay.

16 Other questions, Mr. Etherly.

17 MEMBER ETHERLY: Mr. Chair, let me -- I'm
18 just going to slide in very briefly because I know my
19 colleague Mr. Hildebrand has been chomping at the bit
20 here.

21 But, I -- I -- I want to follow up on --
22 on the questions. Just kind of nagging a little bit
23 and that is with respect to Exhibit Number 31 which is
24 a submission on behalf of the property owners, at
25 exhibit behind tab E, I want to kind of orient us

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1 first before I go into my question, but it's -- it's a
2 fairly simple question.

3 There was a brief line of questionings and
4 I'll preface it with a little bit of introduction.
5 There was a brief line of questioning from Mrs. Miller
6 and from the Chair with regard to whether or not your
7 argument would be different if this were natural fill
8 material or if this were shall we say more of a
9 naturally occurring condition at the subject property.

10 So, my question kind of comes a little bit
11 to -- I'm a number of pages into that particular set
12 of photos behind Exhibit E, but at Exhibit Number E,
13 there's a photograph labeled 2620 Foxhall Road and
14 that would be this picture here and once again, I'm --
15 I'm at the Exhibit Number 31 dated February 25th.

16 MR. CAROME: Do you know how many pages
17 you're in?

18 MEMBER ETHERLY: I'm in quite a few there
19 and we're setting records for voluminosity in
20 exhibits.

21 MR. CAROME: Is there writing on the page?

22 MEMBER ETHERLY: That page at bottom is
23 labeled is 2620 Foxhall Road.

24 MR. CAROME: Yes, I have it.

25 MEMBER ETHERLY: Okay. It is then

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1 followed by two photographs which is labeled with the
2 caption in writing apartment complex on Rock Creek
3 Park, apartment complex at what appears to be 2801 New
4 Mexico Avenue.

5 My question simply is is there a -- is
6 there a difference in your -- in your thinking between
7 some of these examples? I think what they were
8 offered as are simply examples of other instances
9 where retaining walls have been used in a similar
10 fashion. Is there anything with respect to those
11 circumstances that are somewhat different here or
12 would you identify those circumstances also as
13 illustrations of retaining walls run amok essentially?

14 MR. CAROME: Well, each I think is a
15 separate circumstance and I would also note that the
16 fact that someone has built a retaining wall in these
17 locations is obviously not evidence that it complies
18 with the zoning code, that there was a permit for it,
19 that it's in the R-1-A District, that it's in the
20 Wesley Heights --

21 MEMBER ETHERLY: This is true.

22 MR. CAROME: -- Overlay District.

23 MEMBER ETHERLY: Understood, but -- but I
24 -- part of the argument I think you're -- you're
25 teeing up for us here is are these all structures.

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1 So, let's -- let's --

2 MR. CAROME: Yes.

3 MEMBER ETHERLY: -- leave aside any
4 differences in circumstances otherwise. Would you --
5 would you argue that any of these pictures are
6 illustrations of structures?

7 MR. CAROME: Yes, I would and I would -- I
8 would point out -- and there are photos. I took
9 photos from different angles of all of these that I
10 could find and there in my Exhibit 3 and they're
11 described in my affidavit. I'm not sure that sitting
12 here doing this from memory I'm going to get it all
13 right.

14 What is -- what you're referring to at
15 2620 Foxhall Road is an enormous residential property
16 that -- that faces Foxhall Road and come way back. It
17 must be a couple or two or three acres of property.
18 That's a tennis court sitting -- that's -- that's
19 elevated up there. There is a -- there is a concrete
20 tennis court behind that fence that's shown in -- in
21 pictures that I've put in in my Exhibit 3.

22 Undoubtedly, that -- that whole thing is a
23 structure and I don't know whether -- I don't know
24 where that is compared to the -- the rear yard.
25 Whether that's in the required rear yard or the

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1 required side yard. They either got a -- if it is in
2 the required rear yard or the required side yard, they
3 either got a variance for it or they did it without a
4 permit and unlawful and nobody complained about it. I
5 don't know which.

6 The next page is -- this structure here is
7 -- is a swimming pool with a wall and it's of a -- of
8 a high-rise apartment complex not a -- not a single
9 family residence at all. It's a swimming pool.
10 Obviously, the whole thing is clearly is a structure
11 and I don't know.

12 Again, I -- I went and actually walked
13 those woods there looking to see if I could find any
14 indication of -- of boundary markers or otherwise. I
15 could not find anyone. My assumption is that either
16 there was a variance for that. It's certainly not in
17 the Wesley Heights Overlay or -- or it's way, way, way
18 far setback from the -- the property line.

19 So, the same is true for the others.
20 They've -- they've submitted -- I think that fact they
21 had to go to high-rise apartment buildings and they
22 did that with two of their exhibits to find examples
23 of something that supposedly is comparable to this
24 further shows --

25 MEMBER ETHERLY: You mean to an extent --

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1 MR. CAROME: -- how extreme --

2 MEMBER ETHERLY: That this could be the
3 worst case scenario. That if left unchecked, you
4 could have a swimming pool or a tennis court here.

5 MR. CAROME: Oh, yes, in fact, the
6 engineering plans here suggest that that was exactly
7 the Econimedes plans. They -- there is references in
8 Exhibit 24 to the fact that it has been built so that
9 it could support a swimming pool.

10 MEMBER ETHERLY: Okay. Let me come back
11 very brief and then I'm going to shut up for my
12 colleague here, but with respect to just once again
13 understanding, your response would be it makes no
14 difference that a -- an artificial fill element or
15 some type of -- yes, other -- other fill that didn't
16 occur naturally on the site would dictate a different
17 outcome here.

18 MR. CAROME: No, maybe I -- maybe I should
19 clear something up. If the existing grade -- if -- if
20 there was a natural platform here --

21 MEMBER ETHERLY: Um-hum.

22 MR. CAROME: -- and for some reason, you
23 know, the weight of the house or -- or some other
24 concern was causing a concern that well, we need to
25 shore that up with -- with something, I -- I would --

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1 that would be a retaining wall.

2 MEMBER ETHERLY: Okay.

3 MR. CAROME: And I would not consider the
4 preexisting platform, the naturally occurring platform
5 from eons past to be a structure. That -- that would
6 be part of the earth.

7 MEMBER ETHERLY: And if there were a
8 naturally occurring platform, you would also not
9 envision a -- a height limitation for the retaining
10 wall to reenforce that naturally occurring platform.

11 MR. CAROME: Well, that would -- I haven't
12 completely thought that through. It couldn't --
13 obviously couldn't go any higher than -- than the
14 preexisting grade because anything above the
15 preexisting, you know, grade would be of this -- of
16 this imagined natural terrace.

17 MEMBER ETHERLY: Okay.

18 MR. CAROME: Would -- would not be a
19 retaining wall at that point. So, but --

20 MEMBER ETHERLY: Okay.

21 MR. CAROME: -- but -- so, I think it's --
22 I think the fact that this -- that this was all air
23 here and -- and trees that have been filled in, is --
24 makes it completely different from the normal
25 retaining wall situation and -- and further, the fact

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1 that it is a lot of synthetic materials in there makes
2 my case even easier.

3 MEMBER ETHERLY: Okay. Thank you. Thank
4 you, Mr. Chair.

5 COMMISSIONER HILDEBRAND: I guess what I'm
6 trying to understand is the rationale behind the --
7 the idea that a retaining wall can only retain
8 existing material. Why can't a retaining wall retain
9 new material? If -- if someone's regrading their
10 property and they need a retaining wall, why is that
11 no longer a retaining wall simply because there's new
12 fill behind it instead of existing land?

13 MR. CAROME: Well, I would -- I would say
14 that the classic retaining wall is -- is to retain
15 existing soil here. I'm not going to -- I'm not going
16 to push you that hard on that because I -- I think it
17 would be a mistake to get too hung up about that.

18 I -- I win this case easily whether or not
19 the wall is a retaining wall I believe because clearly
20 there is this artificial constructed platform that has
21 been -- has been brought there and -- and obviously,
22 its height in any event is fair above what -- what is
23 allowed.

24 COMMISSIONER HILDEBRAND: When you
25 responded to Ms. Miller's question earlier about the

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1 height of a retaining wall in the building code, you
2 -- you used the definition for the height of a fence
3 wall. Is there specifically a definition in the
4 building code that limits the height of a retaining
5 wall?

6 MR. CAROME: Not in those terms that I'm
7 aware of. But -- but, again, I think that this -- it
8 would be absurd to have a rule that says you can't put
9 up a -- you know, a chain-link fence here above seven
10 feet in a place where it wasn't -- where there was
11 nothing there behind it, but you can put up to an
12 unlimited height a -- a wall and fill in dirt behind
13 it and call it a retaining wall and then escape all
14 height limitations. That -- that would be most
15 absurd.

16 And two of the cases that I cite, one from
17 West Virginia and one from New Jersey which are in my
18 volume, clearly adopt that logic and indicate that it
19 would a mockery to suggest that you can do that. You
20 can't have a seven foot chain-link clear see through
21 fence, but you can put up a wall, fill in dirt behind
22 it, and -- and create a platform and -- and that's
23 okay. That makes no sense.

24 COMMISSIONER HILDEBRAND: And the next
25 question, am I correct in understanding that you're

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1 saying that the photographic examples that were
2 submitted into the record for existing retaining
3 walls, those are within the Wesley Heights Overlay?
4 Is that what you said?

5 MR. CAROME: That is -- that is correct.
6 Mr. Aguglia did submit two the ANC a photograph that
7 is further up the street, further up the park land
8 from this, but I think he thought the better of --
9 which -- which would have been in the Wesley Heights
10 Overlay. I think he thought the better of including
11 it because I went and walked it. It is setback much
12 further than 25 feet. It's not in the required rear
13 yard at all. It's much lower. It's completely
14 different. It's much -- it's attached to the house
15 and it -- it -- it's nothing -- nothing like this and
16 it's not in the required rear yard at all.

17 And so, I think Mr. Aguglia couldn't find
18 any example. The only example he could find in the
19 Wesley Heights Overlay as best I can tell was one that
20 he thought the better of and -- and withdrew.

21 COMMISSIONER HILDEBRAND: I'll -- I'll ask
22 -- I'll ask him that question when we get to it, but
23 -- but, these -- these specific examples that are here
24 are not in the Wesley Heights Overlay?

25 MR. CAROME: To -- to the best of my

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1 knowledge, that's correct and -- and two of them are
2 high-rise -- at least two of them are high-rise
3 apartments.

4 COMMISSIONER HILDEBRAND: Within the
5 Wesley Heights Overlay, do you know of any examples of
6 -- of retaining walls that do exist in R-1 property or
7 on R-1 property?

8 MR. CAROME: There certainly are -- are
9 retaining walls. Yes, I mean I have some on my
10 property that are retaining existing -- existing --
11 where the driveway was cut out, for example, to below
12 grade, retaining walls have been put up to -- to keep
13 the -- the -- the preexisting dirt from falling into
14 the driveway.

15 COMMISSIONER HILDEBRAND: How high are
16 those walls?

17 MR. CAROME: I don't know. I think
18 they're four or five feet.

19 COMMISSIONER HILDEBRAND: Okay. Thank
20 you.

21 MEMBER ETHERLY: Mr. Chair, if I could,
22 let me -- let me then kind of just come back to if we
23 take this wonderfully effective model back to its
24 original state and plus I just enjoy seeing you, Mr.
25 Carome, hop up and take it apart and put it back

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1 together, but I'm just trying to -- to really explore.

2 So, how far would you -- would you say
3 that the property owner could have gone in this case
4 with -- with the property in the condition that it was
5 in? What would be your cutoff point for what they
6 could have done in that rear?

7 MR. CAROME: They -- they could have built
8 up something no higher than -- than four feet above
9 the preexisting grade here. Instead, they put up
10 something 30 feet above it. Same along the sides.

11 MEMBER ETHERLY: And where -- let me -- I
12 mean you -- Mr. Chair, you understand what I'm kind of
13 getting at?

14 CHAIRPERSON GRIFFIS: Absolutely.

15 MEMBER ETHERLY: Maybe I'm not
16 articulating it right.

17 CHAIRPERSON GRIFFIS: So, what would --
18 following, Mr. Etherly's interest this --

19 MR. CAROME: Or they could put up, you
20 know, a seven -- a seven foot fence.

21 CHAIRPERSON GRIFFIS: Sure seven foot
22 fence. Well, now why -- could they not have graded in
23 back and added three feet to the base of it? Added a
24 seven foot retaining then or six feet 11 inches which
25 would be under seven feet under your definition of

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1 what a fence wall would be. What is the ending of the
2 grading that could happen which would make it
3 artificial and make it natural? I think that's what
4 Mr. Etherly is trying to figure out.

5 MR. CAROME: Well, they -- they cannot
6 build up beyond the preexisting grade more than --
7 more than the four feet.

8 CHAIRPERSON GRIFFIS: So, any regrading
9 doesn't change the grade is your -- is your point?

10 MR. CAROME: That's correct and here, you
11 know, this was all a single property. I mean this is
12 the --

13 CHAIRPERSON GRIFFIS: And what in zoning
14 leads us to that designation of picking grade? I mean
15 zoning talks a lot about grade whether it be the grade
16 in front, the height of the curb, the height of the
17 building above adjacent grade, that which
18 differentiates between basement and cellar, the height
19 of accessory structures in the rear of the building
20 that are measured off the center of the rear grade.

21 Where and how do we define grade and when
22 does it change and when does it not change?
23 Certainly, when we look at grades now downtown, we're
24 not going back to the original grading when they first
25 cut the roads or when the fields were.

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1 We had a Georgetown case once where I
2 think we were trying to figure out when it was that
3 the buffalo ran across it to establish its history,
4 but that seemed to be a little bit of a fluke of an
5 argument.

6 So, how do we find grade?

7 MR. CAROME: Well, for this purpose --

8 CHAIRPERSON GRIFFIS: Sure.

9 MR. CAROME: I mean for purposes of 2503,
10 you define grade as the grade above the preexisting
11 grade. I mean what I have spelled out in the memo I
12 -- I've got this open up to figure 2 of tab A of the
13 document I filed of the brief -- supplemental brief I
14 filed yesterday.

15 Before the 1977 amendment that put in the
16 predecessor to 2503, grade was defined as the height
17 of the first floor of the main building on the
18 structure. You could go up to -- you could go up as
19 high as the joists in the -- in the rear yard and --
20 and what the legislative history that I submitted to
21 the panel --

22 CHAIRPERSON GRIFFIS: Of the main floor of
23 the residential unit.

24 MR. CAROME: Yes, before 1977.

25 CHAIRPERSON GRIFFIS: Right.

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1 MR. CAROME: That's what you could do and
2 so, it actually was -- specifically this -- this issue
3 of people trying to put up in their backyards
4 particularly in sloping situations like this, people
5 would say well, I can go up to my -- my first floor
6 here and -- and you were getting situations and
7 situations were being threatened where people could
8 fill up their -- 100 percent of their backyard all the
9 way to the sides and all the way to the rear with
10 structures going up to the first floor and -- and so,
11 you could have enormous structures in the backyard
12 that would have enormous impact on people surrounding
13 at the lower part.

14 The -- the legislative history shows that
15 that was perceived as a loophole and a problem that
16 needed to be fixed and it actually was the -- the
17 adoption of -- it was differently numbered then, but
18 it became numbered as 2503. It was 2503 came into
19 place to prevent that and there is a great deal of
20 attention paid in the legislative history and I've
21 laid this out in my brief to show that -- this was to
22 show that grade would be measured for these purposes
23 from the preexisting grade. Not from -- not from up
24 at the -- at the first level of the house.

25 And I'm pointing to figure 2 of tab A.

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1 That I think is the clearest point to show that --
2 that there's a measurement here of five feet
3 vertically from this point at the end of his deck.
4 That's being shown here in figure two and clearly,
5 what they're doing is they're measuring from the point
6 directly below the deck and the -- the figures show
7 that this is something that would only be allowed as a
8 variance or with special -- special exception and
9 could not have been done as a matter of right.

10 CHAIRPERSON GRIFFIS: Is that diagram
11 showing that that flat portion adjacent to the
12 structure was not regraded but is the natural grade?

13 MR. CAROME: The -- the question of -- of
14 -- I see. The question of -- of natural grade versus
15 grade that has somehow changed over time is not
16 addressed here. I would suggest that -- that we need
17 not delve -- I don't think there's a need to delve
18 into that because I'm not trying to take -- go -- go
19 far -- any further back than what the grade was at the
20 time that the Econimedes began this -- this two-year
21 construction.

22 CHAIRPERSON GRIFFIS: No, but you've heard
23 three of the Board members ask in different iterations
24 the same question --

25 MR. CAROME: All right.

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1 CHAIRPERSON GRIFFIS: -- as I understand
2 it anyway and that is what prohibits one from
3 regrading and then establishing the grade of a
4 retaining wall from that now current grade?

5 MR. CAROME: If -- if -- what prohibits it
6 if it is prohibited is you cannot put a structure in
7 your --

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. CAROME: -- rear yard which is higher
10 than four feet. If the regrading amounts to a
11 structure --

12 CHAIRPERSON GRIFFIS: Right. I understand
13 your argument.

14 MR. CAROME: -- then -- then --

15 CHAIRPERSON GRIFFIS: And I think it's
16 clear and I just want to make sure that the other
17 Board members understand it. Your point is that this
18 is not a regrading, but rather building a structure
19 within --

20 MR. CAROME: Absolutely.

21 CHAIRPERSON GRIFFIS: -- the required rear
22 yard?

23 MR. CAROME: Absolutely.

24 CHAIRPERSON GRIFFIS: And, therefore, if
25 it is entirely a structure, it can't be a retaining

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1 wall and should be measured and dealt with differently
2 in two fashions. Okay. I think it's understood.
3 Understood? Good. Very well.

4 Any other questions from the Board?

5 What was -- you're -- you're talking about
6 the 1977, what's the current citation of the section
7 that you want us to look at?

8 MR. CAROME: It's 2503. It's the basic
9 restriction on any structures in -- in -- in required
10 rear and side yard.

11 CHAIRPERSON GRIFFIS: Okay. If there's
12 nothing further then, let us go to cross. Mr.
13 Aguglia, would you like to start?

14 MR. AGUGLIA: Again, Richard Aguglia
15 representing the property owners in opposition to the
16 appeal.

17 Mr. Carome, do you have an engineering
18 degree?

19 MR. CAROME: No.

20 MR. AGUGLIA: You do not. You are the
21 sole witness in this case?

22 MR. CAROME: No.

23 MR. AGUGLIA: For your position.

24 MR. CAROME: No.

25 MR. AGUGLIA: Who else?

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1 MR. CAROME: Well, there are several
2 affidavits that I have submitted from professional
3 engineers which are in -- in the record.

4 MR. AGUGLIA: Okay. Did not one of your
5 own engineers submit a letter saying that this was a
6 rear yard retaining wall? And I point you to -- to my
7 Exhibit M which I adopted from Mr. Carome's submission
8 from a Mr. Neubauer who stated that on February 14th
9 that he visited the property to review a newly
10 constructed rear yard retaining wall. Is that
11 correct?

12 MR. CAROME: I don't have the document in
13 front of me. If you would like to show it to me, I'd
14 be happy to look at it. I -- I -- it sounds like
15 you're reading it correctly.

16 As I've said I -- I --

17 MR. AGUGLIA: This was your own submission
18 to the Board.

19 MR. CAROME: Yes.

20 CHAIRPERSON GRIFFIS: He just wants to see
21 it to verify it. Can you just show it to him and see
22 what it is?

23 MR. CAROME: I think you're read it
24 correctly, Mr. Aguglia.

25 MR. AGUGLIA: All right. Now, when the

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1 owner submitted their application to build a retaining
2 wall, they submitted a design prepared by Ryan &
3 Associates Professional Engineers. Is that correct?

4 MR. CAROME: I don't know. I see that
5 there is such -- there is a document to that affect in
6 the record. I don't know when it became part of the
7 record.

8 MR. AGUGLIA: All right. This is one of
9 your own submissions which I also copied.

10 MR. CAROME: Yes, I got a copy of that
11 from the DCRA. That is in the DCRA file.

12 MR. AGUGLIA: And it's one of your
13 exhibits.

14 MR. CAROME: Yes.

15 MR. AGUGLIA: It is not? All right. And
16 was it not prepared by a professional engineer
17 certified in the District of Columbia?

18 MR. CAROME: I don't know.

19 MR. AGUGLIA: You don't know? Do you see
20 the stamp on the design?

21 MR. CAROME: I do.

22 MR. AGUGLIA: All right. And can you read
23 the stamp?

24 MR. CAROME: I can.

25 MR. AGUGLIA: Would you please read it to

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1 the Board?

2 MR. CAROME: District of Columbia, William
3 K. Ryan, Number 10946, registered professional
4 engineer.

5 I've -- I've seen other falsified
6 documents in this case. That's why I'm a little more
7 skeptical than I usually would be about what -- what
8 is the case here.

9 MR. AGUGLIA: So, you're saying this is a
10 case of falsified document?

11 MR. CAROME: No, I'm not remotely
12 suggesting that. I -- I just -- I have seen other
13 forged documents in this case. So, I'm not going to
14 readily accept that these are authentic.

15 MR. AGUGLIA: You've seen other forged
16 documents in this case. Okay.

17 In fact -- does not, in fact -- that your
18 exhibit that you have there showing the mesa type wall
19 section, is that, in fact, not stamped by a registered
20 professional engineer in the District of Columbia, Mr.
21 Ryan? Is that not your own exhibit, sir?

22 MR. CAROME: That is my -- that's a page
23 from my exhibit.

24 MR. AGUGLIA: Right.

25 MR. CAROME: Yes.

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1 MR. AGUGLIA: Right. And do you know the
2 engineer called this wall? Did he not call it a mesa
3 site retaining wall?

4 MR. CAROME: Yes, it looks like he did.

5 MR. AGUGLIA: So, is it not fair to say
6 that what we -- did you -- did you understand that a
7 structural engineer for DCRA approved the wall as a
8 retaining wall? Did you understand that from the
9 application? From the application, the back of the
10 application form?

11 MR. CAROME: I saw that the permit was
12 issued for a retaining wall built entirely on the
13 owner's land. I -- I did see that that --

14 MR. AGUGLIA: Okay.

15 MR. CAROME: -- language was used.

16 MR. AGUGLIA: All right. You did. All
17 right. In fact, referring to --

18 MR. CAROME: I mean this is one of -- I
19 mean -- well.

20 MR. AGUGLIA: Referring to my Exhibit G
21 which is the back of the application form, do you see
22 that there's a sign off by a structural engineer by
23 DCRA -- from DCRA as part of the application process?

24 MR. CAROME: I -- I saw a scrawl next to a
25 box that says structural engineer dated 4/23/04. I

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1 mean I note that that's a day after Zoning signed off
2 on it.

3 MR. AGUGLIA: Understood. Understood.
4 But, there's also a quality control at the end for
5 approval. What was that date, sir? At the very end.

6 MR. CAROME: I -- I don't know what you're
7 talking about. There -- there are some scrawled
8 markings on this document. I see where you're
9 pointing.

10 MR. AGUGLIA: Okay. So -- so, what we
11 have is we have one of your own experts referring to
12 this as a rear yard retaining wall. Correct? We just
13 went through that. Mr. Neubauer has referred to it.

14 MR. CAROME: Sure.

15 MR. AGUGLIA: Right.

16 CHAIRPERSON GRIFFIS: Exhibit M.

17 MR. AGUGLIA: All right.

18 CHAIRPERSON GRIFFIS: That's good.

19 MR. AGUGLIA: We have DCRA signing off on
20 this as a retaining wall as part of the application.
21 Is that not correct?

22 MR. CAROME: That is how DCRA
23 characterized it. Yes.

24 MR. AGUGLIA: We have the engineer who
25 prepared the design has referred to it as a retaining

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1 wall. Is that correct?

2 MR. CAROME: That is how that Exhibit 24
3 refers to the --

4 MR. AGUGLIA: Right.

5 MR. CAROME: -- to the structure there.

6 MR. AGUGLIA: And you, sir, have no
7 experts to support your position that it is not a
8 retaining wall. Isn't that correct?

9 MR. CAROME: I don't know whether that's
10 -- that's correct or not, but I -- I think that this
11 is a question of law and -- and --

12 MR. AGUGLIA: No, this is a question of
13 fact. Do you have an expert who testified that this
14 is not a retaining wall?

15 MR. CAROME: I'm not sure. I'd have to
16 review the whole record.

17 MR. AGUGLIA: In fact, this is your
18 surmise as a lawyer that the retaining wall is not a
19 retaining wall. Isn't that correct?

20 MR. CAROME: No, this is -- this is my
21 common sense -- I mean if you're talking about this,
22 the wall, I mean I'm not going to fight you tooth and
23 nail. I think it's best referred to as not a
24 retaining wall because it's -- it's not holding up any
25 preexisting material, but if what you're talking is --

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1 is this a retaining wall, it doesn't take an expert to
2 know that. Common sense tells you that.

3 MR. AGUGLIA: My question is that your
4 position to this Board that this is not a retaining
5 wall, the dirt, the natural dirt, the brought in fill
6 dirt, and the wall that surrounds the filled in dirt
7 is based upon your analysis as a lawyer without expert
8 credentials. Isn't that correct?

9 MR. CAROME: No, I don't think it's
10 correct. I think it is -- it's -- it's much more than
11 my analysis as a lawyer. I think it's my -- my common
12 sense and experience which tells me that that is
13 something other than a retaining wall.

14 MR. AGUGLIA: Okay. But, it's -- it's
15 your -- it's your position whether as common sense or
16 as a lawyer. Correct?

17 Let's go on to the -- let's go on to the
18 design. The design was prepared by your wife. Is
19 that correct?

20 CHAIRPERSON GRIFFIS: You mean the model?

21 MR. AGUGLIA: The model. The model.

22 MR. CAROME: Yes, it was.

23 MR. AGUGLIA: And according to her last
24 testimony, some of it's to scale. Some of it's not to
25 scale. Is that correct?

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1 MR. CAROME: What I referred to as being
2 not to scale before was and I didn't -- I didn't put
3 it here. Was there's a -- there's a house -- I'll get
4 it for you.

5 We didn't use this to represent the -- the
6 Tate's house both in its location and -- and I think
7 in its -- what it is.

8 MR. AGUGLIA: Okay.

9 MR. CAROME: It's not -- I don't think
10 it's exactly to scale and I'm not sure it's exactly to
11 design, but it -- we use it to try to give the Board
12 some idea of where the -- where the Tate's house was.

13 CHAIRPERSON GRIFFIS: But, the rest of the
14 model is relatively to scale. Is that --

15 MR. CAROME: That's correct. And it was
16 drawn specifically from the actual plans from the
17 Econimedes submitted to the DCRA.

18 CHAIRPERSON GRIFFIS: Okay. What is the
19 scale? Do you know?

20 MR. CAROME: The scale is one inch to ten
21 feet.

22 CHAIRPERSON GRIFFIS: Okay.

23 MR. AGUGLIA: Is your wife an architect?

24 MR. CAROME: I don't know for sure. I
25 don't believe she has an architectural degree. It's a

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1 good -- it's a heck of a good model though.
2 Notwithstanding any architectural degree.

3 MR. AGUGLIA: Right. Now, you've done
4 extensive -- an extensive submission to the Board on
5 the legislative history behind the exception in the
6 regulations for fences and retaining walls. Did you
7 do any research on the legislative history behind the
8 Wesley Heights Overlay District?

9 MR. CAROME: No, but I -- I believe that
10 George Watson is here who -- who was the drafter of
11 that and I think he can speak to that perhaps.

12 MR. AGUGLIA: I'm going to submit -- I'm
13 going to submit to the Board the copies of a Wesley
14 Heights Overlay Legislative History and I'm going to
15 refer you to page -- I'm going to refer you to page
16 three of that history. So, this was Zoning Case --
17 for the record, Zoning Case Number 90-5 which actually
18 set the Wesley Heights Overlay District as a text and
19 map amendment in 1992 and it's substantially unchanged
20 except for a few grammatical changes down the road.

21 Now, on page three under lot occupancy,
22 did you notice that where they talked about percentage
23 of lot occupancy, when they talked about a structure,
24 they called it a livable structure?

25 MR. CAROME: I -- I see what you're

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1 referring to. I haven't had a chance to review the
2 whole document. Don't know what it is.

3 If you're asking is this a livable
4 structure, looks like one. I mean I think it's
5 designed for people to live on and it -- it clearly is
6 designed for --

7 MR. AGUGLIA: You don't think it referred
8 to a house as a livable structure?

9 MR. CAROME: No.

10 MR. AGUGLIA: No? Again, under -- on the
11 same page under four area ratio, does it --

12 MR. CAROME: Are we going to -- we going
13 to have a legal debate about this as -- as -- I mean I
14 just object to --

15 CHAIRPERSON GRIFFIS: I would, too. But,
16 I don't know if there's a basis for it.

17 MR. AGUGLIA: He submitted all this
18 legislative history.

19 CHAIRPERSON GRIFFIS: I think it's
20 pertinent to this point in terms of --

21 MR. AGUGLIA: Absolutely.

22 CHAIRPERSON GRIFFIS: -- basically
23 rebutting the legislative history that you've
24 provided. So, now, he's providing the overlay. We'll
25 let it go for a little bit.

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1 MR. AGUGLIA: That's his point number one.
2 It violates the purpose of the Wesley Heights
3 Overlay.

4 CHAIRPERSON GRIFFIS: Indeed.

5 MR. AGUGLIA: And my position is that the
6 Wesley Heights Overlay was meant to apply basically --

7 CHAIRPERSON GRIFFIS: I don't disagree.
8 Let's continue with the questions.

9 MR. AGUGLIA: -- to -- to residential
10 buildings and dwellings, livable dwellings and that
11 unless they're going to pitch a tent and live out
12 there, it's --

13 CHAIRPERSON GRIFFIS: Right.

14 MR. AGUGLIA: -- not a livable structure
15 within the meaning of the regulations.

16 I also -- I also indicate to you on page
17 five --

18 CHAIRPERSON GRIFFIS: But, isn't this --

19 MR. AGUGLIA: -- paragraph C. That is
20 part of the compromise in enacting this that the
21 overlay does not limit tree cutting. Isn't that not,
22 in fact, what the legislative history indicates?

23 MR. CAROME: Well, obviously, the -- the
24 language of the overlay, if this is a legal debate,
25 obviously, the language of the overlay is what is most

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1 important and it says it is to preserve existing
2 trees.

3 I haven't had a chance to review this
4 whole document. You've just put it in front of my --
5 my face. You could have had the courtesy of giving it
6 to me before the hearing, but --

7 CHAIRPERSON GRIFFIS: I wouldn't raise
8 that one.

9 MR. CAROME: But, so, I mean I'd be happy
10 to -- the -- there is -- I'll just submit again.
11 There has been no -- certainly, I'm aware of none and
12 an act of tree destruction and act contrary to the
13 preservation of -- of trees that I actually have ever
14 seen anywhere in Washington in my 20 years here.

15 MR. AGUGLIA: Um-hum. Are you aware that
16 there is a -- an overlay in the District called the
17 Tree and Slope Overlay? Are you aware of that?

18 MR. CAROME: We -- we talked about that at
19 the last hearing.

20 MR. AGUGLIA: But, this is not in the Tree
21 and Slope Overlay. Is it, sir?

22 MR. CAROME: Well, I -- I heard the
23 reading of the case and there was a reference to Tree
24 and Slope Overlay. Sometimes a bit -- I'm a bit
25 mystified, I'm not a zoning lawyer, by the -- by the

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1 language here.

2 CHAIRPERSON GRIFFIS: What's your
3 understanding? Is this property in the Tree and Slope
4 Overlay or not?

5 MR. CAROME: I don't know.

6 CHAIRPERSON GRIFFIS: Okay.

7 MR. CAROME: I've been trying to -- that
8 down.

9 CHAIRPERSON GRIFFIS: Next question.
10 Understood.

11 MR. AGUGLIA: All right. Now, is this on?
12 Can you hear me?

13 MR. CAROME: Does this legal argument
14 count against Mr. Aguglia's 30 minutes?

15 CHAIRPERSON GRIFFIS: No, this is cross.
16 Crafty cross, but cross.

17 MR. AGUGLIA: All right. I would like to
18 -- would you please. I don't want to interrupt your
19 -- interfere with your -- but take this off.

20 Now, this was the original slope. Was it
21 not?

22 MR. CAROME: Yes, that's drawn from page
23 seven of seven of the CIS drawings that are part of
24 Exhibit 25 to the record. My -- my Exhibit 25.

25 MR. AGUGLIA: All right. What would you

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1 say -- did you not say at the ANC meeting that the
2 backyard was --

3 CHAIRPERSON GRIFFIS: What's -- what's the
4 correlation to our proceeding and the ANC testimony?

5 MR. AGUGLIA: Well, let me -- let me
6 rephrase the question.

7 CHAIRPERSON GRIFFIS: Good.

8 MR. AGUGLIA: Would you not agree that
9 this was steeply sloped and unusable as you've said in
10 public meetings?

11 MR. CAROME: It was relatively steeply
12 sloped and relatively unusable. I believe that's the
13 case.

14 MR. AGUGLIA: Okay. Now, were you --

15 MR. CAROME: Relatively -- you know,
16 compared to a piece of flat land which the Econimedes
17 didn't buy when they bought that house 12 years ago.

18 MR. AGUGLIA: The drop off was probably 30
19 to 40 feet?

20 MR. CAROME: I don't -- I don't know
21 exactly what the drop off is. We could -- we could
22 look at the plans to see.

23 MR. AGUGLIA: Okay. But, at least 30 or
24 40 feet?

25 MR. CAROME: I would think so. Yes.

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1 MR. AGUGLIA: Okay. Now, the trees, these
2 were -- could you put the trees back where they --
3 before they were cut?

4 MR. CAROME: Well, I mean I -- I -- there
5 just representation, Mr. Aguglia.

6 MR. AGUGLIA: Okay.

7 MR. CAROME: But, I'll just put them in
8 roughly. They were about -- I don't think I've got
9 enough trees to -- to cover this.

10 MR. AGUGLIA: Okay.

11 MR. CAROME: You'll -- you'll enjoy the
12 aerial photos when you see them.

13 MR. AGUGLIA: All right. Where you aware
14 that the trees were, in fact, casting shadows on the
15 park land just as the wall allegedly is casting a
16 shadow on the park land?

17 MR. CAROME: I bet they did part of the
18 year. I bet they did.

19 MR. AGUGLIA: They did. They did. Okay.
20 And that, in fact, that there was --

21 MR. CAROME: Do you want me to keep
22 putting these up?

23 MR. AGUGLIA: No, that's all right. Now,
24 Mr. Carome, you have to bear with me a minute on the
25 deer.

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1 You said that a family of deer -- that --
2 that it was -- that the wall was pushing wildlife out
3 of the park. Is that correct?

4 MR. CAROME: Absolutely.

5 MR. AGUGLIA: Okay. Now, you testified
6 that you haven't been in this park since 2002 when
7 those trees were cut down because you were so offended
8 by the -- by the tree cuttings.

9 MR. CAROME: Yes.

10 MR. AGUGLIA: So, how do you know -- if
11 you haven't been in the part, how do you know that the
12 vegetation and the deer and everything is
13 disappearing?

14 MR. CAROME: Well, I've been in the park
15 since -- since October and -- and I've seen the -- the
16 swath of -- of, you know, completely destroyed park
17 land around there. I also use to see deer come
18 walking out on Fulton Street all the time.

19 MR. AGUGLIA: So -- so, this was just --

20 MR. CAROME: They're not there anymore.

21 MR. AGUGLIA: -- just from your house?

22 MR. CAROME: No, and I've also heard --

23 MR. AGUGLIA: Not from being in the park.

24 MR. CAROME: Right. Yes. I've seen deer.

25 I've don't think I've ever seen deer while I'm in the

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1 park. I have seen deer when I'm driving home in the
2 past and I've deer, you know, from my house.

3 MR. AGUGLIA: So --

4 MR. CAROME: I've been told by neighbors
5 that there used to be a family of deer that -- that
6 lived right up in this area here and -- and they're
7 not there anymore and I haven't seen deer there for
8 months. I used to see them all the time.

9 MR. AGUGLIA: All right. So, your
10 information on the deer is hearsay because you've
11 never seen deer in the park yourself. Is that
12 correct?

13 MR. CAROME: No. No. No, I -- I --

14 MR. AGUGLIA: Did you just say that?

15 MR. CAROME: No, Mr. Aguglia, you're not
16 listening.

17 MR. AGUGLIA: Didn't you just say that you
18 have never seen deer in the park yourself?

19 MR. CAROME: I have not seen deer while I
20 have been in the park myself. I have seen deer across
21 -- from looking into the park.

22 MR. AGUGLIA: Okay.

23 MR. CAROME: And -- and coming out of the
24 park on Fulton Street where I live.

25 MEMBER ETHERLY: I think we're where we

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1 need to be on the deer, Mr. Chair.

2 MR. AGUGLIA: I'm sorry. I couldn't
3 resist.

4 MEMBER ETHERLY: It was a little Perry
5 Mason moment there.

6 MR. AGUGLIA: All right. In the
7 legislative history behind section 2503.3 that you
8 submitted to the Board and I refer you to the
9 memorandum of -- of September 1976 from Ben Gilbert to
10 the Zoning Commission.

11 MR. CAROME: What's the date? November?
12 You're going to have to help me with that.

13 MR. AGUGLIA: September 1, 1976.

14 MR. CAROME: Oh, September 1. I've got
15 that. That's Exhibit A to my submission.

16 MR. AGUGLIA: Okay. If you would go to
17 page three near the bottom. Does that not say that
18 the items -- those items which may occupy a required
19 side or rear yard as a matter of right are as follows?
20 Are you with me?

21 MR. CAROME: I'm -- I'm there.

22 MR. AGUGLIA: You're there? On the next
23 page, paragraph three, does that not say a fence or
24 retaining wall is one of the exceptions?

25 MR. CAROME: Are you going to read the

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1 whole sentence?

2 MR. AGUGLIA: A fence or retaining wall up
3 to the heights established by the building code may be
4 located in a side or rear yard.

5 MR. CAROME: Yes, I -- I'm the one who put
6 the star there because I think that's a pretty
7 important point.

8 MR. AGUGLIA: Okay. But, this, in fact,
9 is an exception. Is it not? That a fence or
10 retaining wall is a matter of right under the new
11 regulations.

12 MR. CAROME: That's -- that's what it
13 says.

14 MR. AGUGLIA: That's what it says?

15 MR. CAROME: Yes, a fence or retaining
16 wall --

17 MR. AGUGLIA: Right.

18 MR. CAROME: -- up to the heights
19 established by the building code?

20 MR. AGUGLIA: And you've already
21 previously testified that, in fact, that there's only
22 a height limitation for a fence not a retaining wall.
23 Is that not correct?

24 MR. CAROME: No, there is a -- there is a
25 -- there is a height limitation for fences, fence

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1 walls, trellises, and screens and I think that this is
2 undoubtedly a -- at least one or more of those items.

3 MR. AGUGLIA: All right. So -- so, if
4 it's a fence wall or a fence, therefore, it's subject
5 to the height limitations, but if it's a retaining
6 wall, it is not. Is that correct?

7 MR. CAROME: You're -- you're trying to
8 pretend that a retaining wall is a --

9 MR. AGUGLIA: It's a simple question.

10 MR. CAROME: Well, no, it's not. You're
11 trying to pretend that -- that something can only be
12 one thing. Obviously, this -- this thing is in
13 addition to -- I -- I submit it's not a retaining wall
14 for a whole host of reasons. But, even if it is, it
15 is also a fence wall and that -- and that any other
16 conclusion would be -- would be absurd because it
17 would allow people to build platforms of unlimited
18 height directly next to and -- and bordering the
19 property of their -- their rear neighbors and their
20 side neighbors and that -- and that -- and that the --
21 the zoning code is not that -- an absurd item.

22 MR. AGUGLIA: Have you found a definition
23 of retaining wall that excludes fill dirt brought from
24 another site and, therefore, does not make it a
25 retaining wall or part of a retaining wall? Have you

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1 found any -- any Webster's definition that supports
2 that theory?

3 CHAIRPERSON GRIFFIS: Webster's or zoning?

4 What are you asking? Is there a Webster's
5 definition?

6 MR. AGUGLIA: A Webster's definition
7 because of the lack of a --

8 CHAIRPERSON GRIFFIS: Right.

9 MR. AGUGLIA: -- definition in the zoning
10 regulations.

11 CHAIRPERSON GRIFFIS: I see. I see.

12 MR. CAROME: I think both the New Jersey
13 case and the West Virginia case that I cite stand for
14 the proposition that a structure like this is -- is
15 not merely a retaining wall.

16 MR. AGUGLIA: Are you referring to the
17 West Virginia case where there was no application for
18 a retaining wall and they threw some dirt in front of
19 a high wall in order to avoid the -- the height
20 prohibition for a fence? Is that the case you're
21 referring to?

22 MR. CAROME: I cited one West Virginia
23 case. You know, we can -- you know, you can -- you
24 can argue about what -- what you think it says in your
25 brief, Mr. Aguglia.

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1 MR. AGUGLIA: Okay.

2 CHAIRPERSON GRIFFIS: Anything else?

3 MR. AGUGLIA: Just a minute of your
4 indulgence please.

5 Now, Mr. Carome, you made a statement that
6 the application for the retaining wall did not include
7 the Wesley Heights Overlay on the form. That was
8 required to be placed on by DCRA. Is that correct?

9 MR. CAROME: I think that's how DCRA
10 indicates whether it understands it as applying to the
11 Wesley Heights Overlay. One of the ways.

12 MR. AGUGLIA: But, you also testified that
13 all the other applications and permits in the -- for
14 the property indicated the Wesley Heights Overlay.
15 Did you not testify to that?

16 MR. CAROME: The ones related to this
17 project. I guess I would have to make an exception
18 for the -- for the forged and fabricated permit which
19 had the wrong --

20 MR. AGUGLIA: For the forged and
21 fabricated permit?

22 MR. CAROME: Forged and fabricated permit
23 that DCRA faxed to the Econimedes for the supposed
24 emergency raising of the structure. That -- that did
25 not say Wesley Heights Overlay and it did not have the

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1 correct square or lot on it which is how we --

2 MR. AGUGLIA: Excluding --

3 MR. CAROME: -- which is -- excuse me.
4 Let me finish. Which is how we could figure out that
5 it was forged and -- and applicable.

6 MR. AGUGLIA: Okay.

7 MR. CAROME: Other than that, I think.
8 I'd have to go back and I'm -- I'm just going to
9 object and say the record's going to speak for
10 themselves. You want me to take the time and look at
11 each one -- each one of them?

12 CHAIRPERSON GRIFFIS: No, because his
13 question went directly to your testimony.

14 MR. CAROME: Okay.

15 CHAIRPERSON GRIFFIS: And your statement
16 was --

17 MR. CAROME: Yes, the other ones --

18 CHAIRPERSON GRIFFIS: -- that all the
19 other permits listed the Wesley Heights Overlay in
20 their application and --

21 MR. CAROME: Right.

22 CHAIRPERSON GRIFFIS: -- permit
23 submission. So, you've now clarified, I guess, asking
24 the question of --

25 MR. CAROME: Right.

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1 CHAIRPERSON GRIFFIS: -- directly your
2 testimony and you're clarifying the fact that except
3 for one that you take exception of.

4 MR. AGUGLIA: Isn't there a reasonable
5 inference that when DCRA reviewed the file they knew
6 this was Wesley Heights because everything else in the
7 file excluding the -- the raze permit that you allege
8 is a fraud was Wesley Heights? Is that not a
9 reasonable inference, sir?

10 MR. CAROME: It might be in -- in -- in
11 normal circumstances where you have an agency acting
12 in normal ways. I -- I don't believe it's a
13 reasonable inference here.

14 MR. AGUGLIA: And that is because of your
15 implication that DCRA is -- is -- is -- what were the
16 words. Wholly incompetent or incredibly incompetent.

17 MR. CAROME: It was a little better than
18 that, but its incompetence was a major point and there
19 was also concern about -- about worse than
20 incompetence.

21 MR. AGUGLIA: Um-hum. That will conclude
22 my cross examination at this point.

23 CHAIRPERSON GRIFFIS: Very well. Thank
24 you. Let's move on then. Does the ANC want to cross
25 next? I'm sorry. Does the government want to cross

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1 next? DCRA?

2 Let's set -- let's set the order now as we
3 go through. I'll have the appellant, the -- well,
4 heck. What are we going to do here? We'll do
5 appellant, property owner, DCRA, ANC, and then
6 interveners as they come through. Okay.

7 MS. BELL: Mr. Carome, I am probably going
8 to ask you a few questions that Mr. Aguglia already
9 asked you when your answers were not necessarily clear
10 to me.

11 The model was designed by your wife who
12 you say is or is not an architect?

13 CHAIRPERSON GRIFFIS: He wasn't clear.

14 MR. CAROME: I don't believe she's an
15 architect. She has extraordinary talents that -- that
16 allowed her to build this.

17 CHAIRPERSON GRIFFIS: Okay.

18 MR. CAROME: And she -- and she worked
19 from --

20 CHAIRPERSON GRIFFIS: Can I --

21 MR. CAROME: -- and she worked from scale.

22 CHAIRPERSON GRIFFIS: -- can I just say
23 for a quick second, it seems to be something that
24 would be fairly clear or not. I mean did she ever
25 practice architecture?

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1 MR. CAROME: No, but she did go to --

2 CHAIRPERSON GRIFFIS: Okay. That's all
3 right.

4 MR. CAROME: -- to -- to -- all right.

5 CHAIRPERSON GRIFFIS: And, you know, a lot
6 of people take a lot of classes and certainly, we're
7 not going to establish and there's nothing in my
8 regulations that state that it has to be a registered
9 architect to build the model for exhibit on an appeal
10 or an application. So, let's move on with this.

11 MS. BELL: No, but I do think it's
12 important for other reasons.

13 CHAIRPERSON GRIFFIS: Okay.

14 MS. BELL: With -- with regard to the way
15 she constructed the slope and the house and so forth,
16 did she consult an engineer? To your knowledge?

17 MR. CAROME: I don't think specifically.
18 I mean she's -- she's talked to engineers about this
19 structure before she did the model. I don't know
20 whether she talked to an engineer specifically about
21 the building of the model though.

22 MS. BELL: Okay. And you indicated in
23 your -- in your earlier cross that you were not a
24 structural engineer. Is that correct?

25 MR. CAROME: I am not. I know that.

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1 MS. BELL: Okay. That's helpful and --
2 and that you do not dispute that the certification of
3 the wall was -- was done by a certified engineer and
4 that information was provided to DCRA?

5 MR. CAROME: I -- I don't have evidence
6 one way or the other as to whether William K. Ryan is
7 a certified professional engineer currently registered
8 in the District other than -- other than the fact I've
9 seen his stamp --

10 CHAIRPERSON GRIFFIS: But, right.

11 MR. CAROME: -- on the document.

12 CHAIRPERSON GRIFFIS: So -- so, we don't
13 get nutty with this kind of stuff, I mean we got a lot
14 of application and a lot of documents in front of us.

15 Of course, all of this is for our interest not
16 necessarily all of yours. Whose stamp and what
17 document is that looking at?

18 MR. CAROME: That is a page out of Exhibit
19 24 which shows the geo-grid structure. That Exhibit
20 24 is -- is -- is something that we obtained from the
21 DCRA file that for this retaining wall picture.

22 CHAIRPERSON GRIFFIS: This is part of the
23 applicant's permit submissions. Is that right?

24 MR. CAROME: Well --

25 CHAIRPERSON GRIFFIS: Or you're assuming

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1 it was in part of the documentation.

2 MR. CAROME: That would appear -- in the
3 normal course, that's what it would be.

4 CHAIRPERSON GRIFFIS: So, the -- the point
5 is that this isn't a drawing that you had produced and
6 an engineer that you had --

7 MR. CAROME: That's correct.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. CAROME: Sorry.

10 MS. BELL: And your testimony here is that
11 you question the certification mark. Is that correct?
12 Or all certification marks of all documents that you
13 receive from DCRA?

14 MR. CAROME: I'm -- I'm on my toes about
15 whether documents are what they -- what they purport
16 to be in this particular case. I don't have evidence
17 that that's not an authentic document by an authentic
18 engineer.

19 MS. BELL: Okay.

20 MR. CAROME: But, I -- I have real
21 concerns about authenticity of documents in this
22 particular case because I've seen a fabricated --

23 CHAIRPERSON GRIFFIS: Right.

24 MR. CAROME: -- permit.

25 MS. BELL: Yes. Okay. Let me ask you

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1 then since we're back to the documents about the issue
2 of the designation of the overlay on the application.

3 Where in the building codes or in the zoning
4 regulations do you find that it is the practice of
5 DCRA to provide those zoning classifications on the
6 application in the manner in which you've described in
7 this case?

8 MR. CAROME: I -- I can't cite you to a
9 provision. I -- I can just cite you to -- as I do
10 what appears to be the common practice and from what
11 I've seen from looking through DCRA files which I had
12 never done before a couple of months ago, but which
13 I've looked at a lot of and it seems to me that when
14 they -- when DCRA understands that it's dealing with
15 an overlay, it -- it so marks the document and it so
16 indicates on the permit.

17 MS. BELL: So, in your personal
18 experience, the assessment that you've made is it's a
19 practice of DCRA. Is that correct?

20 MR. CAROME: Yes.

21 MS. BELL: Okay. And what affect if any
22 does the zoning designation on the application for a
23 retaining wall have? Since it's your understanding
24 that it is a practice that you believe DCRA has based
25 on your understanding, what is the meaning of the

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1 practice?

2 MR. CAROME: What is the meaning of the
3 practice?

4 MS. BELL: That's right. What would --
5 what would be the purpose of the practice since you're
6 telling us what DCRA's practice is?

7 MR. CAROME: I think it's a way of helping
8 the agency understand what provisions of the zoning
9 code are applicable to the -- to the permit and -- and
10 if they -- if they recognize that it -- it -- it's
11 applicable as it was here, they -- they mark it and if
12 they don't mark it, I think it's an inference that
13 they didn't even realize that -- that it was
14 applicable.

15 MS. BELL: So, the absence in -- you're --
16 you're telling us the absence of the designation
17 means that the zoning technician or anyone reviewing
18 the retaining wall permit did not consider it. Is
19 that correct?

20 MR. CAROME: The absence of it, yes,
21 combined with the fact that this structure is so
22 horrendously contrary to the overlay. Those two
23 things strongly suggest that they didn't consider it.

24 MS. BELL: And can you point to where in
25 the zoning regs that would support your contention

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1 with regard to the need to have it there?

2 MR. CAROME: I don't understand the
3 question.

4 MS. BELL: Okay. You indicated that it
5 would be necessary to consider it and the absence of
6 it means it wasn't considered. Where is that premise
7 in the zoning regs or in the building code?

8 MR. CAROME: I don't know. I'll --

9 MS. BELL: Is it safe to say that would be
10 because it doesn't exist as a regulation?

11 MR. CAROME: No. No, I -- there -- I -- I
12 hazard to guess that there are aspects of the zoning
13 code that I have not yet fully perused.

14 MS. BELL: All right.

15 CHAIRPERSON GRIFFIS: I'm with him on
16 that. Okay.

17 MS. BELL: Yes, I agree. I wholeheartedly
18 agree with you. With regard to the zoning technician
19 and the review of the application, could you tell us
20 please in your opinion what would the overlay -- what
21 affect would the overlay have to do with the retaining
22 wall? Not the building permit for the house, but for
23 the retaining wall.

24 CHAIRPERSON GRIFFIS: So, where does it
25 not conform with the overlay?

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1 MS. BELL: That's correct.

2 CHAIRPERSON GRIFFIS: He's somewhat gone
3 into that in his testimony.

4 MR. CAROME: Well, as I -- as I pointed
5 out --

6 CHAIRPERSON GRIFFIS: You want to be more
7 specific of it.

8 MS. BELL: Well, you know, the problem
9 here is we're sort of arguing in the absence. He's
10 saying it's necessary. The government isn't saying
11 it's necessary. So, I'm trying to -- to flesh out the
12 source of why he believes it's necessary other than
13 his own personal opinion. He can't cite to any
14 particular regulation. He can't identify a practice.
15 He's saying that it's --

16 CHAIRPERSON GRIFFIS: Let me -- well,
17 perhaps I misunderstood your question then. I thought
18 you had moved on from whether they noted the overlay
19 permit in the application.

20 MS. BELL: Oh, no, I have. I have.

21 CHAIRPERSON GRIFFIS: Okay. And now,
22 you're asking him -- so, you're saying that it wasn't
23 reviewed. One indication that it wasn't reviewed for
24 the overlay is it wasn't indicated on the application,
25 the permit.

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1 Now, what is it that gives you the
2 indication that it's not in conformance with the
3 overlay or an indication that it wasn't reviewed for
4 the overlay? Is that right?

5 MS. BELL: Well, no, it's actually a
6 little more subtle.

7 CHAIRPERSON GRIFFIS: Okay.

8 MS. BELL: It's -- if he can tell us
9 concisely what affect it would have to the zoning
10 division for the purposes of the retaining wall not
11 for the house. Because his point is the absence of
12 the designation means it wasn't considered and -- and
13 if we accept that to be true, why would it need to be
14 considered for the purposes of the retaining wall not
15 for the house? Because he concedes that the
16 designation was on all of the building permits for the
17 house and everything else.

18 CHAIRPERSON GRIFFIS: Right and we're not
19 talking about the house today at all.

20 MS. BELL: That's correct and our argument
21 would be as you -- as you know from our papers and --
22 and my summation later, would be that the overlay does
23 not have any specific bearing with regard to the
24 building permit as it relates to the retaining wall.

25 CHAIRPERSON GRIFFIS: Right.

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1 MS. BELL: Now, he's telling us based on
2 his assessment of what DCRA's practice and engineering
3 practices and everything else he's considered it does.

4 So, I'm just trying to get to what -- what affect it
5 does have.

6 CHAIRPERSON GRIFFIS: Okay. And what I'm
7 trying to preclude is going through the entire case
8 presentation of point one and four --

9 MS. BELL: Okay.

10 CHAIRPERSON GRIFFIS: -- and parts of
11 five.

12 MR. CAROME: Two of --

13 MS. BELL: You know --

14 MR. CAROME: -- two of my five arguments
15 were Wesley Heights Overlay based.

16 CHAIRPERSON GRIFFIS: Yes.

17 MR. CAROME: And there are -- and there
18 are others that are made in -- in the papers that go
19 beyond those two.

20 MS. BELL: Do you understand that the
21 general purpose of the overlay is set out in the
22 regulations that create the restrictive regulations?
23 Do you understand that?

24 MR. CAROME: Yes, that --

25 MS. BELL: Okay.

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1 MR. CAROME: -- that there are -- there
2 are general purposes that are set forth in the text of
3 the Wesley Heights Overlay.

4 MS. BELL: So, there would not be
5 additional restrictions that would be provided by the
6 Zoning Administrator or -- or his technicians on the
7 review of permits. Do you understand that?

8 MR. CAROME: I don't understand what
9 you're asking.

10 MS. BELL: There would not be additional
11 restrictions pursuant to this overlay or any other
12 overlay other than what's identified in the
13 regulations. Do you understand that the regulations
14 already incorporate the --

15 MR. CAROME: Yes, the overlay is set forth
16 as part of the zoning regulations at 11 DCMR section
17 1541 and that is what the overlay is and that's -- and
18 I -- as I pointed out, there are -- there are multiple
19 respects in which this walled platform structure
20 violates the Wesley Heights Overlay.

21 MS. BELL: But, you would -- you would
22 agree with me that they're not additional restrictions
23 that the Zoning Administrator would have to consider.
24 Is that correct?

25 MR. CAROME: Well, no, there -- there are

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1 many zoning rules outside the Wesley Heights Overlay
2 that are also part of the zoning code which have also
3 been violated here.

4 MS. BELL: No. No.

5 MR. CAROME: For example, 2503.C --

6 MS. BELL: We're only talking --

7 MR. CAROME: -- 2503.

8 MS. BELL: -- we're only talking about the
9 overlay for the purpose of this question.

10 MR. CAROME: I thought you were asking me
11 about things other than the overlay. So, I'm -- I'm
12 confused.

13 MS. BELL: No. Yes, I think you -- I -- I
14 think you are. Let me --

15 CHAIRPERSON GRIFFIS: Okay. Let's
16 rephrase the question.

17 MS. BELL: -- let me rephrase it again.
18 Let me rephrase again. The overlay does not require
19 additional restrictions other than what's set out in
20 the description for the Zoning Administrator to
21 consider when it reviews building permits for
22 retaining walls. Can we agree on that?

23 MR. CAROME: Are you asking does -- is the
24 overlay restrictions, are they set forth in the -- the
25 overlay section of the zoning code? Is that -- is

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1 that what you're asking me?

2 MS. BELL: No. But, you know what if
3 you're not able to answer that, we can move on.

4 MR. CAROME: I'm sorry. I'm really trying
5 hard.

6 MS. BELL: Let me ask you about -- I
7 really don't think so, but that's okay.

8 Let's take a look at the yard under the
9 definitions. Okay.

10 MR. CAROME: The yard under the
11 definitions. Yes.

12 MS. BELL: Um-hum.

13 MR. CAROME: The definition of yard.

14 MS. BELL: That's right for zoning --

15 MR. CAROME: 199. something in the --

16 MS. BELL: Right.

17 MR. CAROME: Yes, okay.

18 MS. BELL: Thank you. Okay. Can I ask
19 you please to take a look at the rear yard definition
20 and the side yard definition?

21 MR. CAROME: Do you have it handy? I'm --
22 I'm looking for it. There's yard and there's
23 yard/rear.

24 MS. BELL: Right. Could I ask you please
25 to take a minute to read the side yard definition and

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1 the rear yard definition. You can aloud if you'd
2 like.

3 MR. CAROME: All right. I'm looking. You
4 want me to read something out of the code?

5 MS. BELL: If you'd like because I want to
6 ask you a few questions about it. If you want to --
7 if you'd like to read them, you can. Okay.

8 MR. CAROME: I don't see any --

9 MS. BELL: In reading those definitions,
10 do you -- do you understand the government's argument
11 with regard to a retaining wall and it's -- and -- and
12 the fact that it does not need to meet the side yard
13 and the rear yard definitions?

14 MR. CAROME: I don't understand the
15 government's argument on that. Maybe you could
16 explain it. The -- this is a structure in a -- in a
17 required rear inside yard and, therefore, has to meet
18 the exceptions. I don't understand how the government
19 could possibly think that this meets an exception.

20 CHAIRPERSON GRIFFIS: The question is
21 premised on the reading of yard rear and side yard?

22 MS. BELL: Well, actually, yes, yard --
23 rear yard and side yard and actually --

24 CHAIRPERSON GRIFFIS: Okay.

25 MS. BELL: -- it -- it -- I probably

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1 should compare it to the exception that we used in
2 2503, but --

3 MR. CAROME: I'd also point out there's a
4 difference between obviously a rear yard and a
5 required rear yard.

6 MS. BELL: That's correct.

7 MR. CAROME: And these definitions are --
8 look to me like they're -- they're --

9 MS. BELL: That's correct.

10 MR. CAROME: I don't see the word required
11 here, but I don't know that that matters. I just
12 point out that -- just point that out.

13 MS. BELL: Okay. You indicated that you
14 thought it was a fence yard. Do you understand a
15 fence yard and a retaining wall to be one in the same?

16 MR. CAROME: I don't think I have -- if
17 I've used the term fence yard, I didn't -- I didn't
18 mean to.

19 MS. BELL: I'm sorry. Fence wall. Excuse
20 me. Fence wall.

21 MR. CAROME: What's the whole question?

22 MS. BELL: The whole question is you have
23 referred to this platform structure as a fence wall.
24 Do you understand a fence wall and a retaining wall to
25 be different structures?

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1 MR. CAROME: I've not referred to the --
2 the -- platform structure as a fence wall. I have
3 referred to the wall that sits right here around it.
4 I believe that this is a fence wall.

5 MS. BELL: Actually, I think --

6 MR. CAROME: Or possibly a -- I'm having a
7 trouble. Or possibly it's a screen or -- or trellis,
8 but I think it's -- certainly, it's -- it's a fence
9 wall.

10 MS. BELL: Well, actually, in your point
11 five, where you talked about the building code and the
12 prohibition with regard to required walls and the
13 seven foot height limit, you went into a discussion
14 about a fence wall.

15 MR. CAROME: Um-hum.

16 MS. BELL: Okay. And so, what I'm asking
17 you is if you could explain to us what the difference
18 between a fence wall and a retaining wall? Obviously,
19 the government views it as a retaining wall and you
20 believe the government is wrong. So, I'm trying to
21 ask what the difference is.

22 MR. CAROME: Ms. Bell, there are two
23 different points here and maybe I'll -- I'll try to go
24 to the fence point. I think -- one, I think that --
25 that there are a number of good reasons why this is --

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1 why this is not a retaining wall and I -- I went at
2 some length.

3 MS. BELL: Yes.

4 MR. CAROME: And -- and you're -- you're
5 assuming that -- that -- that something cannot -- you
6 know, even if you -- I don't think it -- it is
7 critical to my argument here that this be a -- not a
8 retaining wall. Because even -- even if this -- which
9 I don't think it is, but even if it is a retaining
10 wall, it is also a fence wall because of its location
11 and its function in marking the boundary of the
12 property and forming a barrier to the property. It
13 meets the Webster's definitions of fence and wall to a
14 tee and -- and -- and --

15 MS. BELL: Well, if I -- if I can
16 interrupt for a moment.

17 MR. CAROME: You shouldn't, but -- but go
18 ahead.

19 MS. BELL: Okay. You're -- you're right.
20 I apologize about that.

21 But, we're here because you alleged that
22 the Zoning Administrator erred in determining that it
23 was a retaining wall.

24 MR. CAROME: No, I think you're
25 misunderstanding my argument. I think that the --

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1 they erred in -- in assuming that this entire thing
2 fits within the exception of 2503.3 for a retaining
3 wall constructed in accordance with the D.C. building
4 code. I would say it -- it fails to meet that both
5 because this thing is not a -- a -- just the wall is
6 not a retaining wall that's been built in accordance
7 with the building code and that -- and -- and if just
8 pretend it's a retaining wall, you have ignored this
9 enormous elephant in the room which is the platform
10 which was the purpose that the Econimedes obviously
11 had in -- in going to all the trouble to -- to go
12 through this process.

13 MS. BELL: Well, actually, then perhaps
14 then we need to look at this a little closely. Your
15 issue is that the Zoning Administrator erred when it
16 issued a building permit for the retaining wall and
17 allowed this unnatural soil to be added in back of the
18 retaining wall. Is -- is that how he erred?

19 MR. CAROME: I -- I -- I think it's --
20 it's one of the many ways that the -- that he erred.
21 Yes.

22 MS. BELL: Okay. But, this appeal is only
23 related to the --

24 MR. CAROME: No, it's one of the many ways
25 he erred in issuing the permit at issue in this

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1 appeal.

2 MS. BELL: Okay.

3 MR. CAROME: If I -- if I understood the
4 question right. I'm -- it was a -- it was -- I may
5 have missed a piece of it.

6 MS. BELL: Okay. Well, the reason why I
7 think is because the -- the building permit was not
8 issued for this unnatural soil which you now are
9 saying I guess has affixed itself to --

10 CHAIRPERSON GRIFFIS: Is this a question?

11 MS. BELL: -- to the ground. Do you --
12 you agree with me?

13 MR. CAROME: I think you may be pointing
14 out yet another error in the process which is that
15 there was not a -- there was not a -- a permit for --
16 for essentially creating a landfill here and for --
17 for trucking in all this material. That's another --
18 that's another one of my challenges in the appeal.
19 So, yes.

20 MS. BELL: But -- but --

21 MR. CAROME: So, they allowed -- they did
22 not even have the required permit to do this and yet,
23 DCRA allowed them to -- to not just put up the wall
24 and the mesa blocks which were the only materials that
25 were referred to in the permit application, but they

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1 allowed them to truck in I think it's 6,000 cubic
2 yards of dirt and -- and 20 layers of -- of the geo-
3 grid high tension fabric and there are many, many,
4 many ways in which DCRA didn't do its job here and
5 you've identified another one.

6 MS. BELL: Well -- well, no, I haven't
7 actually. What I'm trying to focus on is the -- the
8 one appeal that -- and the one permit that we're here
9 discussing. Whether or not this is a structure within
10 the meaning of a structure in the zoning regs is just
11 part of your argument. It -- it's not a statement of
12 fact or law at this point.

13 Let me ask you again. The unnatural soil
14 that they've added that -- that you're calling the
15 geo-grids. Correct?

16 MR. CAROME: No. No. No. I -- you --
17 the -- there is soil that was imported and I'm not
18 sure if soil's the right word. There was fill from
19 some donor site that was referred to in the documents
20 that was submitted through DCRA.

21 MS. BELL: What do you call this?

22 MR. CAROME: Then there are -- then there
23 are these things representing the geo-grid layers.
24 There are 20 of those. Those -- those are I think
25 essentially plastic of some sort layers that are high

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1 tension special things that -- that -- that hold the
2 whole thing in place and are attached to the wall.

3 CHAIRPERSON GRIFFIS: You know, it raises
4 an interesting question. If you were to put a
5 concrete cylinder through that area below grade in its
6 grade and fill it with your high speed internet cable
7 and it was this huge conduit that fed this house
8 because this is the most state-of-the-art house and
9 everything's electronic and it swelled to a dimension
10 of five feet, would that then make the entire below
11 grade a structure?

12 MR. CAROME: Well, I think you're -- I
13 think what you're question is -- is -- is missing is
14 that this wasn't below grade. I mean what you're
15 imaging is -- if they put a big huge pipe through here
16 for internet --

17 CHAIRPERSON GRIFFIS: I understand. I
18 understand your --

19 MR. CAROME: -- through these trees --

20 CHAIRPERSON GRIFFIS: Yes, but --

21 MR. CAROME: -- that would be a structure
22 I'd think.

23 CHAIRPERSON GRIFFIS: Take my
24 hypothetical. It's below grade.

25 MR. CAROME: If it's below grade, I don't

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1 know that it's -- it's a structure. It might be.

2 CHAIRPERSON GRIFFIS: So, it wouldn't be a
3 structure.

4 MR. CAROME: It might be. It may well. I
5 probably is a structure actually, but it's -- it's not
6 going to be a problem in the required rear inside yard
7 because it's not projecting more than four feet above
8 grade.

9 CHAIRPERSON GRIFFIS: Right. So, it all
10 comes back to the same issue of where do we establish
11 grade. But, it is a structure then. Not just a below
12 grade structure.

13 MR. CAROME: I think that's right. I mean
14 I think a basement is a structure. A cellar's a
15 structure. I don't think above or below grade is --

16 CHAIRPERSON GRIFFIS: A buried flagpole
17 would be a structure. Okay. Good enough.

18 Anything else? Questions?

19 MS. BELL: Well, I -- I just -- what do we
20 call -- what do you call this land mass that you're --
21 can we call it the geo-grids or do we call it --

22 CHAIRPERSON GRIFFIS: You can call it
23 whatever you want it to be called and then ask the
24 question.

25 MS. BELL: Okay. That -- the unnatural

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1 soil thing, is it your testimony that that in and of
2 itself also blocks the light and air for the Tates and
3 for everyone below regardless of the wall?

4 MR. CAROME: Yes.

5 MS. BELL: Okay.

6 MR. CAROME: I mean it's -- it's obviously
7 suffocating the entire rear yard.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. CAROME: And it's blocking every bit
10 as much as -- as the wall. Yes.

11 MS. BELL: Okay.

12 CHAIRPERSON GRIFFIS: Anything else?

13 MS. BELL: No, that's it.

14 CHAIRPERSON GRIFFIS: Thank you very much.

15 ANC have cross? It's not a requirement.

16 MS. GATES: I know. I just --

17 CHAIRPERSON GRIFFIS: It's not suppose to
18 be a dread either. This is the fun part.

19 MS. GATES: This has been a long day.
20 Hasn't it?

21 I do have a question for you, Mr.
22 Chairman. Have you received --

23 CHAIRPERSON GRIFFIS: You know, there's
24 one procedural thing that I am in charge of and you're
25 not allowed to cross me.

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1 MS. GATES: No, I -- this isn't a cross
2 for you. It's --

3 CHAIRPERSON GRIFFIS: No. No.

4 MS. GATES: -- it's really a direct
5 question.

6 CHAIRPERSON GRIFFIS: Yes, go ahead.

7 MS. GATES: I believe you may be in
8 receipt of documents that the ANC has not received.

9 CHAIRPERSON GRIFFIS: Oh, dear.

10 MS. GATES: For instance --

11 CHAIRPERSON GRIFFIS: You mean the --
12 everything that was submitted this past week?

13 MS. GATES: Only Mr. Carome copied the ANC
14 and I did receive the rebuttal from Mr. Aguglia. I
15 did not receive the Wesley Heights piece that just got
16 handed out. Ms. Bell referred to something she might
17 have submitted. Didn't receive it. I -- I don't know
18 whether --

19 CHAIRPERSON GRIFFIS: Well, DCRA's
20 submission and they're -- I think that they're citing
21 of submission was previously for that last --

22 MS. GATES: Okay. Then I do -- I did make
23 a copy of that out of the file.

24 CHAIRPERSON GRIFFIS: I don't have
25 anything new from DCRA unless others are aware of any.

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1 MS. GATES: I thought she meant she had
2 just submitted something.

3 CHAIRPERSON GRIFFIS: The only other piece
4 that you haven't identified is the Department of
5 Interior. Did you not receive Exhibit Number 51 from
6 U.S. Department of Interior?

7 MS. GATES: Yes, I was handed that this
8 morning or this afternoon.

9 CHAIRPERSON GRIFFIS: Okay. Then I think
10 you have everything we have.

11 MS. GATES: Thank you.

12 CHAIRPERSON GRIFFIS: I'll go through all
13 the rest of it. Board member --

14 MS. GATES: No, I don't want you to go
15 through eight million different --

16 CHAIRPERSON GRIFFIS: No. No. No, it
17 isn't actually.

18 MS. GATES: Oh.

19 CHAIRPERSON GRIFFIS: I think it's three.
20 You've indicated that you have Exhibit Number 47 and
21 48 which was attached which is Wilmer, Cutler,
22 Pickering.

23 MS. GATES: Yes.

24 CHAIRPERSON GRIFFIS: Correct? You have
25 the motion from Mr. Aguglia property.

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1 MS. GATES: Yes.

2 CHAIRPERSON GRIFFIS: And you now have
3 U.S. Interior.

4 MS. GATES: Thank you.

5 CHAIRPERSON GRIFFIS: Excellent.

6 MS. GATES: I just have a couple of
7 questions for you, Mr. Carome.

8 At the time the permit for the wall was
9 issued, was the rear yard at 4825 Dexter Terrace
10 steeply sloped?

11 MR. CAROME: I believe it was. Yes, I
12 mean I -- I believe that really more than anything
13 else from the -- the drawings.

14 MS. GATES: Was there anything in the rear
15 yard for a wall to retain?

16 MR. CAROME: No.

17 MS. GATES: So, would this be considered a
18 fence wall?

19 MR. CAROME: Yes.

20 MS. GATES: And are fence walls limited to
21 a height of seven feet?

22 MR. CAROME: Yes.

23 MS. GATES: Thank you.

24 CHAIRPERSON GRIFFIS: Okay. Let's move
25 ahead. Does the Park Service have any cross? No. No

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1 cross from the Park Service. Very well. We've gone
2 through DCRA, also the property owner, the ANC. Let's
3 move ahead then.

4 Do you have a question?

5 COMMISSIONER HILDEBRAND: Yes.

6 CHAIRPERSON GRIFFIS: Yes, Mr. Hildebrand.

7 COMMISSIONER HILDEBRAND: As part of your
8 package, you submitted the legislative history on the
9 fence height issue, the 2503.

10 MR. CAROME: Yes.

11 COMMISSIONER HILDEBRAND: And it says as
12 you've underlined in bold "A fence or retaining wall
13 up to the heights established by the building code."
14 So, it's your inference that by stating that there
15 must have been an assumption or definite idea that the
16 building codes did establish a height for retaining
17 walls?

18 MR. CAROME: Absolutely. I think that's
19 the only conclusion that can be drawn from that.

20 COMMISSIONER HILDEBRAND: Did you go back
21 to the '76 building code to see if there was a height
22 established for retaining walls in the code?

23 MR. CAROME: I could not go back quite
24 that far. I'm actually still trying to research that,
25 but I believe that the -- and I'm afraid I'm working

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1 from memory here which may not be perfect. I -- I
2 believe that the -- as of 1977, I believe that the --
3 I shouldn't say that. I -- I don't know for sure.

4 COMMISSIONER HILDEBRAND: Yes, you haven't
5 yet. Okay. Thank you.

6 CHAIRPERSON GRIFFIS: Any other questions
7 from the Board? Okay. On the off chance, is there
8 cross on that limited testimony? Very well. Let's
9 move ahead then.

10 We're going to move to DCRA's case, the
11 government's case. Estimation of time that you need
12 to present your case. Thirty. Less than 30.

13 MS. BELL: Yes, less than -- yes, less
14 than 30.

15 CHAIRPERSON GRIFFIS: Okay. That's all
16 right. We're --

17 MS. BELL: Fifteen minutes, but could
18 someone go forward --

19 CHAIRPERSON GRIFFIS: How soon do you need
20 to get ready?

21 MS. BELL: Well, twenty. Left the room.

22 CHAIRPERSON GRIFFIS: I'm not calling you
23 right now. We're going to take a 10-minute break.

24 MS. BELL: Okay.

25 CHAIRPERSON GRIFFIS: And then we're going

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1 to start up with you. If you're not, then we can move
2 ahead with something else.

3 MS. BELL: Okay.

4 CHAIRPERSON GRIFFIS: Very well. We'll be
5 back in ten minutes.

6 (Whereupon, at 4:26 p.m. off the record
7 until 5:01 p.m.)
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23 E-V-E-N-I-N-G S-E-S-S-I-O-N

24 5:01 p.m.

25 CHAIRPERSON GRIFFIS: Okay. I may need to

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1 reassess our scheduled for this afternoon as it is
2 getting close to 5:00. It looks like a 30-minute
3 presentation with questions and cross is about two
4 hour average. That would set us to 7:00 after the
5 government's case roughly.

6 We have one more appeal that we need to
7 get in today.

8 So, what I would like to do is set this
9 off for the 5th of April in the afternoon and continue
10 with the starting point of DCRA and get as -- always
11 optimistically get through the entire thing. We get
12 through as much as possible on the 5th.

13 Let me hear any major problems with
14 something of that iteration. About your case. I mean
15 this one. This instant case. Yes. ETW we call in
16 five minutes -- three minutes -- two minutes.

17 I take it there's no objection from the
18 government. Mr. Carome, how is your schedule?

19 MR. CAROME: No objection.

20 CHAIRPERSON GRIFFIS: Okay. Mr. Aguglia?

21 MR. AGUGLIA: No objection.

22 CHAIRPERSON GRIFFIS: Okay. Any
23 controversy, Ms. Gates? Mr. Murphy? Everyone set. I
24 can't believe it. That has never happened before us
25 in the history of my tenure on this Board. Very well.

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1 I'm sorry for that. I should have given
2 you more of a -- a heads up. I really was perhaps
3 more optimistic than I thought.

4 Questions, procedure, Mr. Aguglia.

5 MR. AGUGLIA: In fairness to my clients,
6 no further filings by Mr. Carome or the Park Service.

7 MR. CAROME: I don't -- I don't -- I'm not
8 aware of any rule that would -- would support that,
9 but I mean there have been questions about matters
10 going back --

11 CHAIRPERSON GRIFFIS: Good. Let's set
12 this one straight though. Mr. Aguglia, you want to
13 cite the regulation.

14 MR. AGUGLIA: Well, the regulation says
15 it's suppose to be -- everything's suppose to be 14
16 days in advance of the hearing by the appellant.

17 MR. CAROME: I -- I think that applies to
18 written evidence. I'm not sure that it applies -- you
19 know, if we find further important legislative
20 history, for example, I would think that this Board
21 would -- would want that.

22 CHAIRPERSON GRIFFIS: So, what you're
23 saying in terms of legal briefing just as long as it's
24 not written evidence. Is that what you're -- that was
25 your assertion?

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1 MR. CAROME: Yes, and it could be that if
2 there's -- if there's important new evidence, I would
3 think -- you know, maybe perhaps there should be some
4 showing as to why it -- it should come late, but I
5 don't -- I don't see why we should have any artificial
6 rule. If there's something important to this Board's
7 decision, I would think it would want it.

8 MS. BELL: Actually, the rule is 3106.2,
9 but I concur with Mr. Aguglia. I think we should
10 close actually the record with regard to filings.
11 Because what has happened here is the case is actually
12 evolved. If you take a look at what was initially
13 filed with the appeal, I -- as I understood it, the
14 appeal had to do with, you know, the lot size and --
15 and the overlay and now we're -- we've moved into it's
16 not a retaining wall, there's unnatural soil, and
17 that's a platform.

18 CHAIRPERSON GRIFFIS: Okay.

19 MS. BELL: You know, it just changed.

20 CHAIRPERSON GRIFFIS: I think I understand
21 the point. I don't see a lot of need based on the --
22 actually the limited scope that we've set out in this
23 appeal for -- obviously, I can't anticipate
24 everything, but I think it will be a hard test to
25 prove for new testimony, witnesses or evidence to come

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1 in at this late date.

2 It does -- it does begin to prejudice if
3 not inconvenience those involved and the Board. I
4 think we've eliminated an awful lot of issues from
5 FOIA to environmental to all these other aspects and I
6 think it was well put today in the case presentation
7 on the -- on the -- the zoning points.

8 So, that being said, let's keep it to a
9 bare minimum if any at all. Obviously, there's going
10 to be a major justification for that. It -- it gets
11 us quickly into the case to get into substance much
12 more so than if we have four or five motions to begin
13 the proceedings. So, let's leave that under direction
14 advisement.

15 Anything else?

16 MR. AGUGLIA: No.

17 CHAIRPERSON GRIFFIS: Okay. Is there any
18 anticipation in terms of the record being kept open
19 for the rebuttal or direction of the submissions of
20 today that they would be put in before the 5th?
21 Should I set a date requirement for that or are we
22 going to let that flow? That's somewhat to the Board,
23 but also to the --

24 MR. AGUGLIA: Relating -- I'm sorry.
25 Relating to my rebuttal to the Park Service --

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1 CHAIRPERSON GRIFFIS: Right.

2 MR. AGUGLIA: -- statement, we would try
3 -- let's see. April. That's a Tuesday obviously.

4 CHAIRPERSON GRIFFIS: That's three weeks
5 from now. Is it not? Three -- three weeks.

6 MR. AGUGLIA: Three weeks.

7 CHAIRPERSON GRIFFIS: You'd be ready to
8 present that on the 5th?

9 MR. AGUGLIA: Oh, yes.

10 CHAIRPERSON GRIFFIS: Okay. That's all I
11 need.

12 MR. AGUGLIA: Yes.

13 CHAIRPERSON GRIFFIS: And obviously, if
14 you have that in the written form prior to that, that
15 would be --

16 MR. AGUGLIA: I would try to get it to the
17 parties by let's say the prior Wednesday before the
18 hearing.

19 CHAIRPERSON GRIFFIS: Let's say Wednesday
20 by 3:00 --

21 MR. AGUGLIA: All right.

22 CHAIRPERSON GRIFFIS: -- into the Office
23 of Zoning. It will also be distributed to the
24 parties. Thank God you're not writing that. Okay.

25 The record's also open for the government

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1 DCRA. It's your understanding that you're also
2 addressing that?

3 MS. BELL: Yes.

4 CHAIRPERSON GRIFFIS: Okay. Now, that's
5 -- that's inclusive of Mr. Murphy's filings, but also
6 that of the legislative history.

7 We'll take -- leave the record open for
8 the Wednesday before the Tuesday that we meet again,
9 March 30th.

10 MR. MOY: Mr. Chairman, that date is March
11 30th.

12 CHAIRPERSON GRIFFIS: Thank you very much.
13 Indeed. For -- what was I saying? Ah, indeed. We
14 have had the -- the filing today on cross of the
15 overlay which we could take information or written
16 submissions on that.

17 Then -- now, we're going to have all these
18 new filings then. Everybody's very excited.

19 We're going to have to give the
20 opportunity for rebuttal. The point of having those
21 in prior to the 5th is the presentation of the case.
22 We'll obviously incorporate those and then would be
23 able to be crossed. So, the record's not open for
24 rebuttal to the responses to the first filings. So,
25 we don't start a whole volume at --

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1 MR. CAROME: Although, I would ask that if
2 on legal points that -- that there be permission for
3 written rebuttal. I think that would actually save
4 the time of the Board.

5 CHAIRPERSON GRIFFIS: Oh, it absolutely
6 does. It absolutely and I think that can come up as
7 we get into the proceedings, but I don't want people
8 to hold off great volumes of information that -- that
9 think -- and as I said prior, I think the last point
10 of which the legal arguments can be made is when the
11 findings and conclusions are -- are submitted for the
12 Board's review and that's the last submission.

13 Okay. Are all of you clear on that?

14 MR. AGUGLIA: Yes.

15 MR. CAROME: Yes, thank you.

16 CHAIRPERSON GRIFFIS: That's fine.
17 Question?

18 VICE CHAIRPERSON MILLER: I want to -- I'm
19 -- I'm not totally clear. Can I just try to see if
20 this is the right --

21 CHAIRPERSON GRIFFIS: No, because now it's
22 going to confuse --

23 VICE CHAIRPERSON MILLER: No, but are you
24 saying --

25 CHAIRPERSON GRIFFIS: But, they're leaving

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1 the room now with clarity. Let them go.

2 VICE CHAIRPERSON MILLER: Okay. I guess
3 everybody else is clear.

4 CHAIRPERSON GRIFFIS: We'll -- I'll get it
5 clear for you. Me, you, Cliff, in the back room.
6 We'll get it clear. Okay. If there's no other
7 questions. Yes, Mr. Murphy.

8 MR. MURPHY: Mr. Chair, I do have one
9 question. We have been referred to and we would be
10 wanting to submit exhibitry to demonstrate the
11 preexisting condition and the conditions through the
12 construction.

13 CHAIRPERSON GRIFFIS: Do you have that
14 already prepared?

15 MR. MURPHY: This would be aerial -- we
16 have that already reported.

17 CHAIRPERSON GRIFFIS: Well, what are you
18 waiting for?

19 MR. MURPHY: We will submit that on our
20 way out the door. I'll --

21 CHAIRPERSON GRIFFIS: Indeed. It should
22 be. In fact, everyone's here. If you can hand
23 deliver all of that, you can count that as your
24 service. It would be well -- there's no -- you know,
25 there's no element of surprise in these hearings. We

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1 give everybody enough time to digest all the
2 information. So, only expedites things if you get it
3 in sooner.

4 MR. MURPHY: Thank you, Mr. Chair.

5 CHAIRPERSON GRIFFIS: That would be great.
6 You'll going to put that on the record.

7 MR. MURPHY: Do it right now.

8 CHAIRPERSON GRIFFIS: We'll have that for
9 the 5th. The parties will be served that today.
10 We're in good shape. Ms. Gates?

11 MS. GATES: What time on the 5th?

12 CHAIRPERSON GRIFFIS: Oh, it's an
13 excellent question. Ms. Gates is always on point with
14 these questions and her question was what time on the
15 5th?

16 As I am obviously the worse, proven over
17 and over again, to set schedules, we have two other
18 cases in the afternoon on the 5th. The first one's at
19 2:23 which as you well know is the -- is the special
20 exception. It should go fairly quickly. I'm not
21 aware of what the second case is. At this point, I'm
22 prepared to call this the second case in the
23 afternoon.

24 I'm going to assess how long we think the
25 second case that is now advertised will actually go.

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1 This may well be the third case if it can go quickly.

2 So, that all being said, it will be
3 sometime after 2:00. Okay.

4 Anything else? Any other questions,
5 clarifications? The 5th. Excellent.

6 Thank you all very much. Appreciate you
7 spending the time with us this afternoon. Indeed and
8 we'll see you on the 5th.

9 If there's nothing further in this case,
10 Mr. Moy, when you're ready, we can call the next case.

11 MR. NYARKU: Second case -- second case in
12 the afternoon is Application 17288 Appeal of Eastern
13 Trans Waste of Maryland, Inc. pursuant to 11 DCMR
14 sections 3100 and 3101 from the administrative
15 decision of the Zoning Administrator of the Department
16 of Consumer and Regulatory Affairs. Appellant alleges
17 that the Zoning Administrator erred by denying the
18 issuance of a building permit and instead requiring
19 variance relief from the Board of Zoning Adjustment to
20 make internal repairs and improvements to an existing
21 solid waste transfer facility in the Capitol
22 Gateway/CR District at premises 1315 1st Street, S.E.,
23 Square 703, Lot 54.

24 CHAIRPERSON GRIFFIS: Excellent. Thank
25 you, Mr. Nyarku.

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1 Okay. If I can have the last case. Exit
2 or sit down and listen to the next case. We'll move
3 on to the next case.

4 Let me ask first of all are there people
5 here -- I know you've been here for a long time, but
6 has anyone come in that was not previously sworn in.
7 If they could just raise their hand if they weren't
8 sworn in. Everyone here present has been sworn in.
9 So, we're ready to go.

10 If you are ready to proceed, I'll just
11 have you introduce yourself again for the record.

12 MR. GOLDBERG: Yes, thank you. This is
13 Roy Goldberg, counsel for the appellant Eastern Trans
14 Waste in this matter.

15 And as an administrative matter, we have
16 no new exhibits, but we have taken our brief and taken
17 the exhibits that are part of the record already and
18 attached them. We made several copies.

19 CHAIRPERSON GRIFFIS: Oh.

20 MR. GOLDBERG: And I'd be happy to send
21 those up so that everybody can have that --

22 CHAIRPERSON GRIFFIS: That would be --

23 MR. GOLDBERG: -- if that's appropriate.

24 CHAIRPERSON GRIFFIS: Found copies of this
25 stuff. Okay. Mr. Goldberg, you do, in fact, have one

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1 preliminary matter and that's a motion of which I'm
2 going to address.

3 Actually, what you're going to do is just
4 hand it to Mr. Nyarku. He'll put it in evidence and
5 then give it to -- distribute it to the Board and you
6 have one for government. Correct? Excellent. Or
7 two. Whichever they might need.

8 If I'm not mistaken Exhibit Number 19
9 actually is a motion by you requesting the recusal of
10 Ms. Mitten for sitting on this case. Is that correct?

11 MR. GOLDBERG: That's correct, Mr.
12 Chairman.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. GOLDBERG: We think that it may be
15 moot given the fact she was --

16 CHAIRPERSON GRIFFIS: It is indeed. Yes,
17 moot and I don't think it takes up any action of the
18 Board. As you know, as you stated in here, the Zoning
19 Commission does rotate onto the BZA as was established
20 I think some time ago. Mr. Hildebrand is with us this
21 afternoon and will be hearing this case.

22 So, that being said, we can put to the
23 side and move on to -- I believe we can go right into
24 case presentation.

25 MR. GOLDBERG: Yes, thank you. We

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1 appreciate very much the opportunity to -- to present
2 this before the Board. We appreciate the schedule
3 accommodation especially for our -- our witnesses.

4 For purposes of this presentation, we --
5 we incorporate our brief which has been submitting and
6 we have prepared copies of the brief with the exhibits
7 attached that have been submitted as well.

8 Appellant challenges the decision of the
9 Zoning Administrator at DCRA to refuse to grant the
10 application for the construction building permit for
11 the solid waste transfer facility.

12 Instead of issuing the permit, DCRA
13 referred it to the Board for a variance on the ground
14 that the permit could not be issued without a
15 variance. This determination was erroneous,
16 arbitrary, and capricious.

17 Let's take a look at the -- the memo which
18 is Exhibit --

19 CHAIRPERSON GRIFFIS: Good. If you -- if
20 you step too far from the mike, I'm just going to have
21 you take a hand held or bring that closer. That's
22 actually much better.

23 MR. GOLDBERG: This is the actual memo.
24 It's Exhibit 4. It is also in the book. Thank you.

25 CHAIRPERSON GRIFFIS: Good and it was

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1 submitted previously. Do you know what exhibit it is
2 in --

3 MR. GOLDBERG: Yes, Exhibit 4.

4 CHAIRPERSON GRIFFIS: Oh, I'm sorry.

5 MR. GOLDBERG: Sure.

6 CHAIRPERSON GRIFFIS: Good. So, that's
7 what it's relating to.

8 MR. GOLDBERG: So, Exhibit 4 is the
9 decision --

10 CHAIRPERSON GRIFFIS: Excellent.

11 MR. GOLDBERG: -- that it's being appealed
12 from.

13 CHAIRPERSON GRIFFIS: Good.

14 MR. GOLDBERG: I've highlighted the key
15 language that we believe was arbitrary and capricious.
16 The fact that the DCRA concluded or found that the
17 proposed work would result in an enlargement of the
18 facility and also the -- the reference to the work --
19 or to the facility rather as a non-conforming was also
20 erroneous.

21 This enlargement determination was
22 arbitrary and capricious because there's no evidence
23 in the record to support it. There's no finding in
24 the record at all and all of the evidence is to the
25 contrary. It was before the DCRA on this issue.

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1 The only possible reference in the record
2 to the -- to an enlargement was a memo from the Office
3 of Planning to the DCRA which is Exhibit 5 both in the
4 booklet and before the -- before the Board which said
5 that in reference to this zoning change and the fact
6 that it was a conforming use, but it could not expand.

7 The Office of Planning told DCRA well,
8 after completion of the renovation project, you're
9 going to have ten new employees. There's going to be
10 three to five additional vehicles.

11 So, the only possible basis in the record
12 for an enlargement finding was that factual
13 information provided by the Office of Planning.

14 The problem with that is that it was --
15 they just got it wrong and I'm not sure that it's even
16 in dispute. I've not seen any filing from the
17 government that it was right. Because the -- and
18 we'll hear from witnesses, but the EISF form that was
19 submitted specifically said during construction, yes,
20 you will have these ten additional people and some
21 additional vehicles, but at the operational phase
22 after construction, there will be no change.

23 So, it's a classic case here of agency
24 perhaps making a finding based on information that was
25 just completely wrong and that should have been

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1 repaired, but it wasn't. So, we have this
2 determination that is wrong and a decision that is
3 wrong because it's based on an erroneous and arbitrary
4 factor determination.

5 I've also mentioned the fact that -- when
6 they refer to it as a non-conforming use, that's not
7 consistent with what the Zoning Commission did with
8 respect to the Capitol Gateway Overlay. Rather they
9 found existing industrial uses were conforming uses
10 not non-conforming uses.

11 Even if there was a finding there of an
12 expansion or an enlargement, it's not borne out by any
13 facts or by any legal application. I won't go into
14 what we've done in the brief, but I think we've set
15 out several cases. One was a D.C. case. The Hot
16 Shoppes case. Also other jurisdictional cases. Which
17 talk about the fact, look if you're going to, you
18 know, try to improve efficiency, modernize, repair,
19 that's not an expansion for purposes of the zoning
20 statutes -- zoning laws.

21 We have brought with us three company
22 officials. Actually two company officials and the
23 contractor to provide what we think can be very brief
24 testimony and evidence if the panel is so inclined to
25 hear that to put in the record the fact what these

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1 changes were proposed to do, what they were not
2 proposed to do, the nature of the changes, and the
3 treatment by the DCRA and we're prepared to do that.

4 Again, we have -- the first witness will
5 be Mark Reynolds of Durable Steel. He is the
6 contractor that was hired to do the work, get the
7 permit, dealt a lot with the DCRA and other government
8 officials.

9 We also have Rob Sochovka who is with the
10 company also and was very much involved in trying to
11 get the permit and deal with this process.

12 And we also have David Florance of the
13 corporate office who we probably won't be presenting
14 as an affirmative witness, but he's available if
15 there's any questions with respect to any company
16 matters.

17 CHAIRPERSON GRIFFIS: Good. I think it
18 would be advisable to call on these witnesses to adopt
19 some of the testimony. Obviously, there's an awful
20 lot of substantive legal argument most of which you've
21 laid out and very straightforwardly.

22 Let me ask you just quickly. On the Hot
23 Shoppe you had talked about, that went to kind of
24 modernizing, but not looked at by the courts as an
25 expansion of the facility and is that also in the

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1 frame -- my understanding is part of that was -- even
2 if business increased, business went well, that
3 doesn't count as an expansion of the facility. Is
4 that your assertion?

5 MR. GOLDBERG: Yes, let me refer to -- the
6 Hot Shoppes issue was this enlargement issue. It
7 didn't use the word expansion and it was the --

8 CHAIRPERSON GRIFFIS: Right.

9 MR. GOLDBERG: -- the carding area.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. GOLDBERG: And I think the key thing
12 about that case also was that you can't just call it
13 an enlargement without having evidence in the record
14 and since the evidence in the record was I think just
15 an affidavit, that it was an enlargement. That it was
16 wrong. In that case, it was the Board. Here we're
17 looking at the DCRA to call it an enlargement.

18 The other cases we did cite would include
19 this helicopter associate cite, mere increase in the
20 amount of business done pursuant to a -- in this case,
21 a non-conforming use is not an illegal expansion.

22 You'll actually -- so, yes, we would say
23 that it's our position.

24 I think you'll hear from the witnesses
25 that this was not work that was done to try to expand

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1 the business, but rather it was to deal with problems
2 at the facility caused by a snowstorm, caused by the
3 fact that there was only one trade scale in effect and
4 if you had a problem with that trade scale, then you
5 had no scale.

6 So, this wasn't a let's go from, you know,
7 80 percent of the market to the 90 percent of market
8 or increase the business as much as just try to keep
9 up with where we -- where they were and where they
10 wanted to be and also to try to increase some
11 profitability from the mix which isn't so much a
12 volume issue as rather a -- a profit issue as to the
13 volume that you're going to hopefully continue to do
14 and we can get into all that from an evidentiary
15 basis.

16 CHAIRPERSON GRIFFIS: Yes. Good. Last
17 preliminary question I have. I'm not sure if I saw
18 definitively. Obviously, the EISF was submitted. Was
19 an environmental impact statement done?

20 MR. GOLDBERG: No.

21 CHAIRPERSON GRIFFIS: It was not required
22 by the agencies that reviewed the EISF. Is that
23 correct?

24 MR. GOLDBERG: Yes, the -- the evidence --
25 the exhibits that we have here, let me run through

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1 those very fast and if it -- if it needs to be done, I
2 would request that these exhibits all be approved and
3 accepted. Exhibits 1 through -- I believe we have 1
4 through 12 as part of the record.

5 CHAIRPERSON GRIFFIS: Right.

6 MR. GOLDBERG: Exhibit 2 is a document
7 where initially in October this was approved for
8 zoning.

9 CHAIRPERSON GRIFFIS: Right.

10 MR. GOLDBERG: When the permit wasn't
11 issued, inquiries were made and it became --
12 information came to the witnesses you'll hear from
13 that -- that the DCRA had taken the position that
14 despite that initial approval, they had missed
15 something in the law with respect to the EIS and what
16 would -- what would happen for a -- for a substantial
17 modification or a -- or a new construction of a solid
18 waste facility and so, this letter, Exhibit 3, was
19 issued where they quoted this particular law and then
20 made the statement that the proposed work is
21 substantial.

22 Now, in response to that, clarification
23 was sought by the company. A meeting was sought and
24 held and at that meeting, DCRA said something to the
25 effect that this is good news. We're going to

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1 reconsider this issue. About six weeks later, an EISF
2 which, of course, is substantially less of a burden to
3 prepare although not completely without burden than an
4 EIS, was submitted and at that point on for several
5 months, DCRA acted as if okay, well, we accept this
6 and now we've floated to the agencies and that's where
7 you got the Office of Planning to comment and other
8 agencies ultimately and this would be Exhibit 11.

9 DOH I think probably the most important
10 one from the health point of view obviously made a
11 determination, this is Exhibit 11, that we do not
12 recommend preparation of an EIS for this project. No
13 negative, you know, health impact, et cetera.

14 So, I would say that the -- all of the
15 agencies that received the EISF package, the only
16 negative that came out of it was Office of Planning
17 and that was based on what they perceived to be the
18 zoning and frankly, the erroneous factual
19 determination. So, that's where that stands.

20 CHAIRPERSON GRIFFIS: Good. Thank you.
21 Any other preliminary questions? Mr. Etherly.

22 MEMBER ETHERLY: Thank you very much, Mr.
23 Chair. Just very briefly.

24 Mr. Goldberg, you -- you may -- you
25 probably will go over this in terms of your

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1 substantial presentation, but just to make sure I'm
2 clear because I think it's a fairly straightforward
3 factual question, in terms of the reference to the
4 EISF, the discussion about operation phase versus
5 construction phase, that was kind of one of the
6 outstanding questions for me.

7 Just to make sure I'm clear with the
8 distinction, as you referred -- as -- as your client
9 referred to it in the EISF, the construction phase,
10 your reference to the additional personnel and the
11 additional vehicles on site, was that intended to
12 simply reference additional personnel and equipment
13 that would be on site pursuant to the actual
14 construction activities and installation of the new
15 equipment versus operational phase, no additional
16 equipment, no additional personnel --

17 MR. GOLDBERG: Correct.

18 MEMBER ETHERLY: -- beyond your regular
19 complement on site?

20 MR. GOLDBERG: Correct. Mr. Reynolds will
21 address that and you'll hear him testify that -- that
22 those were his folks that were going to be site and he
23 perceived the EISF form to require the breakout of
24 that information and that's why he provided it in that
25 way.

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1 MEMBER ETHERLY: Thank you.

2 CHAIRPERSON GRIFFIS: Good. One technical
3 point on Exhibit 12, do you have page number three in
4 both the copies that you've provided or unless -- it
5 doesn't seem to flow correctly. Starting with the
6 memorandum of points of authorities in support, the --
7 this -- the --

8 MR. GOLDBERG: I can explain.

9 CHAIRPERSON GRIFFIS: -- willful --

10 MR. GOLDBERG: Right.

11 CHAIRPERSON GRIFFIS: -- cynical ploy for
12 financial -- plaintiff requests a granting. It seems
13 like there's a page missing there.

14 MR. GOLDBERG: There's not. The -- the
15 reason for making this submittal was what was on pages
16 four, five, and six. The page one there was there
17 just so that you had a title of the document.

18 CHAIRPERSON GRIFFIS: I see.

19 MR. GOLDBERG: Right. So.

20 MS. BELL: And actually, if I can inject
21 for a moment. The government does intend to not only
22 reference that particular motion in its presentation,
23 but I'll be glad to provide you a copy of -- a
24 complete copy of the motion. Because we actually
25 think it's important to this proceeding.

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1 CHAIRPERSON GRIFFIS: Okay.

2 MR. GOLDBERG: We don't think it's
3 important, but we have an opposition we filed
4 yesterday that we'd be happy to give as well if that's
5 important to this panel.

6 CHAIRPERSON GRIFFIS: Okay. See that is a
7 live one. Yes, Ms. Miller.

8 VICE CHAIRPERSON MILLER: I just want to
9 get sure on this. I thought that you said Exhibit 2
10 showed that -- that it was originally approved by DCRA
11 for zoning.

12 MR. GOLDBERG: Exhibit 1 would show that
13 actually.

14 VICE CHAIRPERSON MILLER: It's Exhibit 1.

15 MR. GOLDBERG: Right.

16 VICE CHAIRPERSON MILLER: Where in Exhibit
17 1 does it show that?

18 MR. GOLDBERG: Sure. Take a look at the
19 first page. Second box, zoning, 10/11/03. You got to
20 the right-hand column. It says approved. There's a
21 check.

22 VICE CHAIRPERSON MILLER: Oh, okay. Okay.

23 MR. GOLDBERG: You can actually go on the
24 website --

25 VICE CHAIRPERSON MILLER: Yes.

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1 MR. GOLDBERG: -- at this point for DCRA
2 and building permits and you actually see it says
3 approved for zoning there. It even -- as of Friday,
4 it did and it's an exhibit to the brief and the
5 related case that you'll see if we submit that.

6 VICE CHAIRPERSON MILLER: Thank you.

7 MR. GOLDBERG: Sure.

8 VICE CHAIRPERSON MILLER: Is there a
9 signature that goes with this that you see on there?

10 MR. GOLDBERG: Okay. Mr. Reynolds advised
11 that, you know, reviewer -- these are the initials
12 that were done by the intake person.

13 VICE CHAIRPERSON MILLER: And the
14 reviewer, do you know who that is?

15 MR. GOLDBERG: He doesn't recognize the
16 initials.

17 VICE CHAIRPERSON MILLER: Okay. Thank
18 you.

19 CHAIRPERSON GRIFFIS: Mr. Hildebrand.

20 COMMISSIONER HILDEBRAND: At several
21 points in -- during your submission of information,
22 there's a reference to the physical modifications to
23 the facility will either increase or decrease by more
24 than 10 percent of the facility's maximum annual
25 capacity. What is the applicability of that language?

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1 Where does it come from?

2 MR. GOLDBERG: It goes back to last year
3 and I'm not sure I recall where it is. I did have a
4 hand in that language. It may deal with this major
5 action issue and I can find that answer. I don't know
6 off the top of my head what it goes back to.

7 COMMISSIONER HILDEBRAND: Is it --

8 MR. GOLDBERG: It maybe a test that's in
9 -- that's in the statute and perhaps that the part of
10 the statute not specific to a waste -- solid waste
11 facility.

12 COMMISSIONER HILDEBRAND: It's not in the
13 zoning. It's not in -- it's not zoning language.
14 It's language from somewhere else.

15 MR. GOLDBERG: That's -- that's correct.
16 It's not zoning language.

17 CHAIRPERSON GRIFFIS: Right. It appears
18 on page five, Mr. Hildebrand. As -- as I was looking
19 at that which it's an excellent question, it says more
20 than ten percent per year of the facilities max manual
21 capacity as indicated in any applicable solid waste
22 facility permit. Is that where the language comes
23 from?

24 MR. GOLDBERG: There's a -- there's a test
25 of that sort out there. We don't -- just to clarify,

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1 I mean, you know, we filed our appeal based on the
2 issue of whether it's an enlargement or not. We don't
3 think the issue of the EIS is -- there's been no
4 decision made. We're were -- it's not a ripe issue to
5 be appealed.

6 CHAIRPERSON GRIFFIS: Right. Right.

7 MR. GOLDBERG: So, we're not pursuing
8 that.

9 CHAIRPERSON GRIFFIS: And we would tend to
10 agree, but I think it's an excellent point to clarify
11 what we're looking at in terms of -- because, you
12 know, zoning often does deal with the increase in
13 intensity of use, but certainly that's not the case of
14 what you are relying on.

15 MR. GOLDBERG: No.

16 CHAIRPERSON GRIFFIS: This ten percent --

17 MR. GOLDBERG: It's an EIS issue.

18 CHAIRPERSON GRIFFIS: Exactly.

19 MR. GOLDBERG: Right. Which we don't
20 actually think is even a relevant issue for this
21 panel, but --

22 CHAIRPERSON GRIFFIS: Right. I would tend
23 to agree. Okay. Anything else?

24 MR. GOLDBERG: No.

25 CHAIRPERSON GRIFFIS: Good questions.

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1 Anything else from this end? Very well. Let's call
2 -- let's get to the witnesses then unless -- did you
3 have something?

4 MR. GOLDBERG: No.

5 MS. BELL: Yes, actually, the government
6 would like to make preliminary comments with regard to
7 the Federal action and I -- I --

8 CHAIRPERSON GRIFFIS: Preliminary
9 comments?

10 MS. BELL: Yes.

11 CHAIRPERSON GRIFFIS: Why don't we wait
12 until we hear from their witnesses? Wouldn't that be
13 more pertinent?

14 MS. BELL: Well, it might be helpful for
15 the Board to know that there is a parallel action
16 going on right now on the same issues that are before
17 the Board.

18 CHAIRPERSON GRIFFIS: Oh, dear. Why would
19 that help us?

20 MS. BELL: Well, if I could continue.

21 CHAIRPERSON GRIFFIS: I don't know. Well,
22 okay. I know what the lawyer's going to say. Hey,
23 look down at the other end. I don't -- I don't want a
24 legal -- the Board's opinion. Do we want to get into
25 this? How -- all right. Let's -- any objection to --

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1 MR. GOLDBERG: Yes, well, yes, it wasn't
2 filed as a motion. It's not procedurally before.

3 CHAIRPERSON GRIFFIS: Right.

4 MR. GOLDBERG: And obviously, we're going
5 to disagree with what she said and everything she has
6 said.

7 CHAIRPERSON GRIFFIS: Let me ask you this
8 quickly. Would it preclude us from -- from continuing
9 today? Our knowledge or -- or any action outside of
10 this appeal.

11 MS. BELL: Well, I think if we take the
12 facts as presented by ETW in the Federal action,
13 arguably, there would be no reason for this proceeding
14 to go forward.

15 CHAIRPERSON GRIFFIS: Well, then that --
16 it sounds like a good -- a good -- a good presentation
17 of your case perhaps or cross, but I don't see it as a
18 preliminary -- it would essentially --

19 MS. BELL: Okay.

20 CHAIRPERSON GRIFFIS: -- be a preliminary
21 motion at this point.

22 MS. BELL: All right.

23 CHAIRPERSON GRIFFIS: But, I'm not sure
24 what direction it's taking.

25 Let's run through this. This seems to be

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1 pretty quick.

2 MS. BELL: Okay.

3 CHAIRPERSON GRIFFIS: We're getting
4 through this on great speed. I should call the entire
5 crew from the other one back. We'll take our dinner
6 break and get to them shortly, but then we'll get to
7 you and perhaps it's appropriate cross or even case
8 presentation. Let's go ahead.

9 MR. GOLDBERG: Oh, thank you. You know,
10 depending on what the -- the Board would like to do
11 and what the court reporter would be willing to do,
12 we'd even be willing to bring up both Rob and -- and
13 Mark at this time because there is sort of a -- a
14 little bit of him and a little bit of Rob.

15 CHAIRPERSON GRIFFIS: Let's go. It's your
16 -- it's your --

17 MR. GOLDBERG: So, why don't we do that?
18 Right.

19 CHAIRPERSON GRIFFIS: -- table, your
20 panel.

21 MR. GOLDBERG: I think it would go a
22 little quicker. Right.

23 CHAIRPERSON GRIFFIS: You bring up
24 whoever. If it's best for you not to ask some
25 questions they can answer very expeditiously, that's

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1 great. If you're going to set them off to give their
2 presentation, whichever you prefer.

3 MR. GOLDBERG: Could you both state your
4 names for the record?

5 MR. REYNOLDS: My name is Mark Reynolds.

6 MR. SOCHOVKA: Robert Sochovka.

7 MR. GOLDBERG: And Mr. Reynolds, where do
8 you work?

9 MR. REYNOLDS: Durable Steel Structures.

10 MR. GOLDBERG: What is that company?

11 MR. REYNOLDS: It's a general contractor
12 pre-engineered metal building.

13 MR. GOLDBERG: And where are you based?

14 MR. REYNOLDS: Baltimore.

15 MR. GOLDBERG: And what's the relationship
16 with Eastern Trans Waster?

17 MR. REYNOLDS: Contractual agreement to
18 renovate their existing structure.

19 MR. GOLDBERG: And when did you enter into
20 that agreement?

21 MR. REYNOLDS: 2003.

22 MR. GOLDBERG: And tell us about the
23 structure as you came upon it with respect to your --
24 the work that you were going to do?

25 MR. REYNOLDS: The existing structure has

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1 snow damage from the year 2000 on the roof. Now, this
2 building's a large facility. It's 53,000 square feet.

3 It's mostly a metal building, pre-engineered
4 structural steel and there's a small portion of it
5 that's conventional structure which means it's bar-
6 joisted, brick and wood, metal.

7 That portion of it is the portion that's
8 damage. The roof has holes in it. The structural
9 steel has instability to it.

10 We looked at repairing it compared to
11 replacing some of the steel. We've done all the
12 evaluations. So, the small portion of the
13 conventional building needs to be restored. The
14 existing bathrooms and a lunchroom are old and in
15 disrepair. On the set of plans, we have included
16 replacing and repairing those facilities.

17 MR. GOLDBERG: What about the trade scale?
18 What is that and what were you going to do?

19 MR. REYNOLDS: The trade scale is old. It
20 is --

21 MR. GOLDBERG: What's it used for?

22 MR. REYNOLDS: It is used to weigh the
23 trucks going in the facility.

24 MR. GOLDBERG: Okay. So, what were you
25 going to do with the trade scale?

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1 MR. REYNOLDS: We were going to replace
2 the existing weigh scale and provide one additional
3 one.

4 MR. GOLDBERG: And could you explain if
5 you know or, Mr. Sochovka, which I will get right at
6 some point, what the purpose of the -- and I'll invite
7 you to chime in, the purpose of the new scale was?

8 MR. REYNOLDS: Well, the purpose of the
9 new scale was the existing scale -- there's only one
10 scale for the facility. The scale frequently breaks
11 down and it is a requirement that the trucks get
12 weighed and with the one scale breaking down, it was
13 stopping operations. So, we were going to put in two
14 weight scales.

15 MR. GOLDBERG: Were you involved in
16 preparing the permit application?

17 MR. REYNOLDS: Yes.

18 MR. GOLDBERG: Could you take a look at
19 Exhibit 1 and tell us if that is the application and
20 quickly run through what that is?

21 MR. REYNOLDS: Yes, I filled out and --
22 and entered this building permit as it is exhibited in
23 section one.

24 MR. GOLDBERG: What's -- what's going on
25 in the first page and I'll ask you to specifically

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1 refer to any approvals that were given and what agency
2 gave those approvals.

3 MR. REYNOLDS: The -- during the submittal
4 process, I went to the front counter and did all the
5 preliminary paperwork. The intake person, I believe
6 his name was Tony --

7 MR. GOLDBERG: What agency?

8 MR. REYNOLDS: It was with the Building
9 Permits Department.

10 MR. GOLDBERG: DCRA?

11 MR. REYNOLDS: Yes.

12 MR. REYNOLDS: We -- I filled out all the
13 required paperwork, provided all the documentation,
14 submitted it. At that point, it went through the
15 process of -- of being distributed and reviewed by
16 their agencies within the --

17 CHAIRPERSON GRIFFIS: Okay. I think we
18 can get through.

19 MR. REYNOLDS: Okay.

20 CHAIRPERSON GRIFFIS: We're pretty
21 familiar and you don't have to --

22 MR. REYNOLDS: Fine.

23 MR. GOLDBERG: That's fine.

24 CHAIRPERSON GRIFFIS: -- have everything
25 introduced.

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1 MR. GOLDBERG: Good.

2 CHAIRPERSON GRIFFIS: We've accepted all
3 this as submissions.

4 MR. GOLDBERG: That's good.

5 CHAIRPERSON GRIFFIS: So, he doesn't have
6 to identify it all.

7 MR. GOLDBERG: I appreciate that.

8 CHAIRPERSON GRIFFIS: Clearly, you're
9 going into the fact of what we've already established
10 that it went through Zoning and was approved by the
11 reviewer. Is that correct?

12 MR. REYNOLDS: Yes.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. GOLDBERG: That's very well. Okay.
15 If you could turn to the page with respect to the work
16 that was going to be done, the contract agreement. Is
17 that a contract that was entered into with this page
18 here? It's part of Exhibit 1. What is that document?

19 MR. REYNOLDS: That is a government form
20 that I had to fill out for -- as part of the permit
21 application. It's called the contract agreement.

22 MR. GOLDBERG: Does that describe the
23 proposed work here?

24 MR. REYNOLDS: Yes, it does.

25 MR. GOLDBERG: In the middle of the page.

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1 Okay. Then what -- let me ask you the next page
2 where it says official use only. What's going on
3 there? DCRA reviewer.

4 MR. REYNOLDS: At that point, a DCRA
5 reviewer had signed off. A statement. It was for
6 official use only. Environmental impact screening
7 form required. It was marked off no. Signed off by a
8 DCRA reviewer and it was dated 10/10 or '03.

9 MR. GOLDBERG: So, what was the initial
10 decision of DCRA with respect to whether an EISF was
11 needed?

12 MR. REYNOLDS: No, it was not.

13 MR. GOLDBERG: Okay. Now, tell me about
14 the next page quickly. What's going on here? The
15 check marks yes and no.

16 MR. REYNOLDS: Okay. This one was an
17 intake form. Going over the existing structure.

18 MR. GOLDBERG: Why did you check number
19 seven? Is that your check mark?

20 MR. REYNOLDS: Yes, it is.

21 MR. GOLDBERG: And why did you check that?

22 MR. REYNOLDS: Because it was solely an
23 interior renovation with no change of use or capacity
24 of the structure being renovated.

25 MR. GOLDBERG: Is that true?

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1 MR. REYNOLDS: Yes, it is.

2 MR. GOLDBERG: Okay. And let's go --

3 CHAIRPERSON GRIFFIS: Just for our
4 clarification, the -- the intake form. We're looking
5 at the first page. It's says over and then it
6 actually goes to the second page which is behind the
7 first page in -- in my bound copy. Is that everyone's
8 understanding? Okay.

9 MR. REYNOLDS: It would probably be --

10 CHAIRPERSON GRIFFIS: Just so we don't get
11 mixed up.

12 COMMISSIONER HILDEBRAND: Can I ask a
13 question?

14 CHAIRPERSON GRIFFIS: Yes, Mr. Hildebrand.

15 COMMISSIONER HILDEBRAND: Is it my
16 understanding that you weren't changing any of the
17 structure of the building? None of the roof joists
18 were being changed? None of the exterior skin?

19 MR. REYNOLDS: No, the exterior -- the
20 roof joists were being changed and some of the steel
21 was modified as it was listed in the permit
22 application here as well as the drawings.

23 COMMISSIONER HILDEBRAND: So, it's not
24 purely an interior renovation where you're just
25 changing partitions and you're -- you're affecting the

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1 building structure.

2 MR. REYNOLDS: Yes, but I don't think that
3 question asked if I was changing the building
4 structure.

5 MR. GOLDBERG: He was referring to
6 question seven.

7 MR. REYNOLDS: Yes.

8 MR. GOLDBERG: Okay. Was question seven
9 accurately answered?

10 MR. REYNOLDS: Yes. Yes, I believe it
11 was.

12 MR. GOLDBERG: Why is that?

13 MR. REYNOLDS: Because it wasn't changing
14 the capacity. It said the structure -- capacity of
15 the structure being renovated. It's not -- it was
16 just repairing the existing.

17 MR. GOLDBERG: Was it changing the use?

18 MR. REYNOLDS: No, it was not.

19 MR. GOLDBERG: Okay. Mark, could you go
20 on then to the page that has your affidavit in it?
21 Environmental Health Administration construction
22 permit application supplemental form. Environmental
23 question.

24 MR. REYNOLDS: Yes.

25 MR. GOLDBERG: What is this document?

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1 MR. REYNOLDS: This was another form to be
2 filled out during the permit application phase.

3 MR. GOLDBERG: Okay. And then the next
4 page. That's -- it's DIS. So, we're going to go
5 over.

6 MR. REYNOLDS: Yes. Okay. Okay.

7 MR. GOLDBERG: Right.

8 MR. REYNOLDS: Okay. Next page.

9 MR. GOLDBERG: Same -- same language about
10 the -- no EISF form?

11 MR. REYNOLDS: Yes, this is the one where
12 they said no -- no, EISF form was required.

13 MR. GOLDBERG: Okay. So, Mr. Reynolds,
14 what happened after the -- this was submitted in
15 October of 2003, What happened after that?

16 MR. REYNOLDS: It came to I believe it was
17 in January of '04. I had been following and -- and
18 updating and tracking the permit phase. I went to the
19 permit counter. Tony was there. He was -- he said
20 that I needed to supply a sediment control plan and
21 Tony and I were -- I was at words with him a little
22 bit because a sediment control plan, this is all
23 interior work. There's no exterior. There's no rain
24 to be involved. How are you going to involve a
25 sediment control plan with interior renovations?

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1 MR. GOLDBERG: Did you end up submitting
2 such a plan?

3 MR. REYNOLDS: Yes, I did.

4 MR. GOLDBERG: Why was that?

5 MR. REYNOLDS: Because I could proceed any
6 farther without it. So, yes, I did design something
7 although it seemed ridiculous to me at the time. I
8 went out and had -- because I had to have my engineer
9 sign and seal it. So, of course, it's -- it's all
10 relevant to expense, but I went ahead and did it
11 rather than fighting the system. I went ahead and
12 provide -- provided a sediment control plan for an
13 interior renovation.

14 MR. GOLDBERG: And did you get the permit
15 at that point?

16 MR. REYNOLDS: No, because when I supplied
17 the -- when I was supplying that, he came up with
18 another form that I had to take to the health
19 department. A whole different building. Another
20 department needed to sign off on it.

21 MR. GOLDBERG: Did you do that?

22 MR. REYNOLDS: Yes, I did that. When I
23 was at the counter, Tony told me because we were --
24 even after supplying and he said okay, you go off to
25 the health department and get this signed off with.

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1 I'm going to take care of this particular problem
2 which was the -- which was the sediment control plan.

3 So, I went up to the health department and
4 the health department within that hour signed off and
5 I went back to Tony's department.

6 MR. GOLDBERG: And but, obviously, you
7 didn't get the permit still. So, what happened next?

8 MR. REYNOLDS: So, Tony was -- seemed a
9 little startled that I came back and he had me sit on
10 the side for a little while and --

11 MR. GOLDBERG: Did the issue of the EIS
12 come up then at some point?

13 MR. REYNOLDS: Yes, the EIS did.

14 MR. GOLDBERG: Why don't you go into that
15 briefly?

16 MR. REYNOLDS: He -- he introduced me to
17 -- to -- let me think of her name here.

18 MR. GOLDBERG: Ms. Bennet?

19 MR. REYNOLDS: Yes, Ms. Bennet.

20 MR. GOLDBERG: Lorraine Bennet. Okay.

21 MR. REYNOLDS: Lorraine Bennet and
22 Lorraine Bennet had actually --

23 MR. GOLDBERG: Was this in December or
24 January?

25 MR. REYNOLDS: This is in --

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1 MR. GOLDBERG: Around that time?

2 MR. REYNOLDS: Around that time. Yes.

3 MR. GOLDBERG: Okay.

4 MR. REYNOLDS: I don't have the exact
5 date. The first meeting I was postponed and had to
6 come back to see Lorraine Bennet because I didn't get
7 any -- she wasn't available. So, I came back three
8 days later and Lorraine Bennet sat me down in her
9 office and explained to me that there's a -- a law
10 that she never knew about before and that the laws are
11 listed in here. That we have to do -- that -- that
12 there's -- this is a major modification as it's listed
13 in the law and that further --

14 MR. GOLDBERG: Was this -- was this a
15 reference to what's in Exhibit 2 in that letter? Is
16 that what she was referring to?

17 MR. REYNOLDS: Yes. Yes.

18 MR. GOLDBERG: Okay.

19 MR. REYNOLDS: And then she gave the back-
20 up laws to recite that.

21 MR. GOLDBERG: And then at some point, you
22 got the letter that is Exhibit 2 from Denzel Noble?

23 MR. REYNOLDS: Actually, Rob got that. It
24 wasn't sent to me, but Rob received it I believe.

25 MR. GOLDBERG: Okay. Then Rob, why don't

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1 you tell us about that?

2 MR. SOCHOVKA: Right. Right around
3 January when Mark had the conversations with Lorraine
4 and we weren't getting our permits, I took it upon
5 myself to even give Lorraine a call to find out what
6 was going on and she basically reiterated what she had
7 told Mark of this regulation and Environmental Policy
8 Act Title 8 D.C. Code 109.11 about referencing a
9 substantial modification. At which point, she wasn't
10 clearly sure whether that related to us or not. At
11 that point here, we requested a meeting and it would
12 be, you know, to see if we can sit down and talk to
13 them to find out about this code.

14 MR. GOLDBERG: Did you have such a
15 meeting?

16 MR. SOCHOVKA: Yes, we did. On January --
17 on -- after we got the letter on January 15th, we
18 requested a meeting and a letter was sent to them
19 requesting that meeting and on January 27th, 2004, the
20 meeting actually took place at the offices of DCRA.

21 In our letter to DCRA from their January
22 12th letter was asking the question what qualifies the
23 project as a substantial modification? What is an
24 EIS? Who performs it? Who approves it? And then we
25 had another question. Can restoration of the facility

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1 continue on whether this EIS was going?

2 MR. GOLDBERG: And at the meeting on the
3 27th of January, was the EIS issue resolved or dealt
4 with in any way?

5 MR. SOCHOVKA: No, the meeting that took
6 place on January 27th lasted about a total of three
7 minutes.

8 MR. GOLDBERG: What happened?

9 MR. SOCHOVKA: We sat down at the meeting.
10 It was myself and Mr. Reynolds, Lorraine Bennet,
11 Denzel Noble and I believe legal counsel. I don't
12 recall her name, but I believe it was Theresa Lewis.

13 MR. GOLDBERG: And Mr. Noble is with DCRA?

14 MR. SOCHOVKA: That is correct.

15 MR. GOLDBERG: And what -- what did they
16 say?

17 MR. SOCHOVKA: Basically came in. Like I
18 said a short meeting. He said we have good news for
19 you. We are reconsidering your application and we
20 should have you a letter by that Friday with our
21 determination and we took it upon ourselves. Okay.
22 We'll wait until Friday until you reconsider our
23 application.

24 MR. GOLDBERG: And then what's the next
25 thing that happened?

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1 MR. SOCHOVKA: Friday came, the 30th and
2 we haven't heard from -- we did not hear from DCRA for
3 -- through January, February, and into March. They
4 replied to us.

5 MR. GOLDBERG: And what happened in March?
6 Did you guys make a new submittal?

7 MR. SOCHOVKA: In March -- in March of
8 2004, we were instructed internally to go ahead with
9 the EISF. At which point, we started the -- myself
10 and Mark started the documentation and putting
11 together the information to submit an EISF.

12 MR. GOLDBERG: And is Exhibit 3 then what
13 was submitted by Mr. Reynolds?

14 MR. SOCHOVKA: Yes, Exhibit -- yes, it was
15 and it was submitted on March 30th, 2004. It's
16 Exhibit 3.

17 MR. GOLDBERG: And, Mr. Reynolds, did you
18 take the lead in preparing the EISF?

19 MR. REYNOLDS: Yes, I did.

20 MR. GOLDBERG: What did you -- how did you
21 go about doing that?

22 MR. REYNOLDS: Well, I was handed a -- a
23 governmental form to fill out. Now, as it's submitted
24 here, the first page is actually a cover sheet.
25 Explained what it is, who prepared it, and -- and

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1 further information. The first paragraph about major
2 action and construction that they brought up. That it
3 was not a major action and who -- the -- the people
4 that were going to be in there during construction
5 phase. So, I was trying to make it very evident that
6 it was not a major modification. So, I put a cover
7 page to it.

8 Further, then the next page, I listed
9 exactly what was on the permit application as it was
10 listed.

11 MR. GOLDBERG: Tell us about the last two
12 paragraphs on the second page of Exhibit 3. Why did
13 you put that there and -- and what -- what were you
14 conveying? These two paragraphs.

15 MR. REYNOLDS: Yes, I was just reading it.
16 I was -- in my conclusion, I was reemphasizing that
17 this is not a major renovation. This is a simple,
18 small project.

19 MR. GOLDBERG: Why did you put the
20 language in there about what will be entailed in the
21 construction phase and what would be entailed in the
22 operational phase?

23 MR. REYNOLDS: Because they had that
24 listed specifically and very carefully in the
25 documentation that they gave me.

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1 MR. GOLDBERG: And what -- what message
2 were you trying to convey with this language?

3 MR. REYNOLDS: That it will not change the
4 existing conditions.

5 MR. GOLDBERG: And is that, in fact, what
6 was intended? That there would be no change in
7 personnel or vehicles after the work was done?

8 MR. REYNOLDS: That is correct.

9 MR. GOLDBERG: And who were the additional
10 folks going to be during construction phase? Who was
11 going to hire them?

12 MR. REYNOLDS: My own -- my own people.
13 My own crews and my own work vehicles. During the
14 construction phase only.

15 MR. GOLDBERG: There are -- if we go
16 through the form there, pages five for example, pages
17 six, pages -- primarily five and six there's phrases
18 project will not alter or change existing conditions.
19 Do you see that language you use there?

20 MR. REYNOLDS: Under page five, number
21 six, yes.

22 MR. GOLDBERG: It's also on number seven,
23 number --

24 MR. REYNOLDS: Um-hum.

25 MR. GOLDBERG: -- seven there.

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1 MR. REYNOLDS: Yes, I do.

2 MR. GOLDBERG: Number eight as well. What
3 did you mean by that?

4 MR. REYNOLDS: Well, reading the question,
5 it was asking -- this form was asking questions
6 relative to a new construction project. Not an
7 existing construction project. So, I wanted to
8 reiterate throughout this form that this is not a new
9 project. It doesn't consist of wetlands or existing
10 topos or anything that new construction, new
11 utilities. All the way through this form, it directed
12 you to new projects. Nothing relative to an existing
13 project.

14 So, I was trying to reiterate all the way
15 through here. This has nothing relative to a new
16 project. It is existing and it is staying as it is.

17 MR. GOLDBERG: Then it's either one of
18 you. Could you tell us about the government's
19 response to the EISF?

20 MR. SOCHOVKA: Yes, when we submitted the
21 EISF, we had some correspondence back and forth with
22 DCRA to the point that the 19 agencies that supposedly
23 got our EISF that we would need to answer any
24 questions and respond to those questions and to my
25 knowledge here, the only responses that we did have

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1 was from the Department of Health who had earlier
2 signed off that an EISF was not needed.

3 So, during the period through May or March
4 30th through June or July, we had gone back and forth
5 with various correspondence to Department of Health to
6 satisfy their questions and answer their questions.

7 The DCRA would not act until they received
8 comments back from all 19 agencies and it seemed to be
9 that the Department of Health was the last one holding
10 up any response from DCRA between they went forward
11 with anything.

12 MR. GOLDBERG: Was there a meeting on
13 September 23rd at DCRA regarding the permit
14 application?

15 MR. SOCHOVKA: Yes, there was.

16 MR. GOLDBERG: Who was present at the
17 meeting?

18 MR. SOCHOVKA: That would be myself, Mark
19 Reynolds, Mr. Goldberg, Denzel Noble, and Lorraine
20 Bennet.

21 MR. GOLDBERG: And what happened during
22 the meeting?

23 MR. SOCHOVKA: We basically requested the
24 meeting to sit down, say okay, all the information is
25 and we do know that you got a response letter back

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1 from Department of Health. Where are we with us
2 receiving our permits? They had all the information
3 that -- that came back.

4 At that meeting, they had supplied us a --
5 a May 3rd from the Office of Planning.

6 MR. GOLDBERG: Is that Exhibit 5?

7 MR. SOCHOVKA: That would be Exhibit 5.

8 MR. GOLDBERG: And is that something you
9 had seen prior to September 23rd?

10 MR. SOCHOVKA: No, all the correspondence
11 from the other agencies, none of that correspondence
12 ever came back to us. It went directly to DCRA. So,
13 this May 3rd letter was -- the first time that we got
14 notice of this was at the September 23rd meeting.

15 MR. GOLDBERG: If you could take a look at
16 Exhibit 5 for a moment in the third paragraph. The
17 Office of Planning in this memo states after
18 completion of the renovation project, approximately
19 ten new employees with between three to five
20 additional vehicles will be added to the site. Do you
21 see that language?

22 MR. SOCHOVKA: Yes, I do.

23 MR. GOLDBERG: Is that language accurate?

24 MR. SOCHOVKA: No, that is incorrect.

25 MR. GOLDBERG: And why is that?

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1 MR. SOCHOVKA: Well, it clearly
2 demonstrated through the EISF and also through various
3 inspectors from the Department of Health, would
4 question whether there was going to be an enlargement
5 to the facility or expansion of the facility, that
6 there was not going to be.

7 So, between the EISF and various
8 inspections from various agencies, it was clearly
9 denoted that there would not be any expansion or any
10 enlargement of the facility.

11 MR. GOLDBERG: And was the -- the error
12 brought to the attention of the DCRA during the
13 September 23rd meeting?

14 MR. SOCHOVKA: Yes, it was.

15 MR. GOLDBERG: And what was the response
16 and by whom?

17 MR. SOCHOVKA: Through -- through Denzel,
18 the response was that we would have to proceed through
19 the Office of Zoning to appeal the process because it
20 was pretty much already ruled upon. So, there wasn't
21 anything that DCRA was going to do at that point until
22 we cleared up the matter with the zoning.

23 MR. GOLDBERG: And did DCRA give you any
24 indication as to what their next step would be in the
25 process?

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1 MR. SOCHOVKA: They -- they reserved the
2 right to -- obviously, once we went through and got
3 the -- through the next step of the zoning, that they
4 would reserve whether to -- to rule on whether an
5 environmental impact statement would be done. Would
6 be needed.

7 MR. GOLDBERG: Could you take a look at
8 Exhibit -- I believe it's Exhibit 10. An October
9 12th, 2004 memo addressed to you. Is that right?

10 MR. SOCHOVKA: That is correct.

11 MR. GOLDBERG: Is that about the time you
12 received that memo?

13 MR. SOCHOVKA: Yes.

14 MR. GOLDBERG: And it refers to in the
15 first paragraph to a letter of referral to the Board
16 of Zoning Adjustment. Do you see that? It says sent
17 under separate cover.

18 MR. SOCHOVKA: Yes, I do.

19 MR. GOLDBERG: Was that -- any such
20 document attached to this October 12th memo?

21 MR. SOCHOVKA: No, it was not.

22 MR. GOLDBERG: And prior to today, did you
23 see or receive from DCRA such a document?

24 MR. SOCHOVKA: No, I have not.

25 MR. GOLDBERG: Okay. What about the

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1 second and the third provision? What was -- was that
2 consistent with what as said at the September 23rd
3 meeting?

4 MR. SOCHOVKA: Yes, the second statement,
5 it was part of the meeting. It was just to the point
6 of, you know, what -- what can we do to go forward?
7 If there's something that's holding up this
8 application, what are we allowed to do or what can we
9 submit to clarify this or to correct this and we had
10 asked them to state, you know, what -- what we can do
11 and what we cannot do and this is their response back
12 to us saying that if we did modify or change anything,
13 that it would be -- it would be considered.

14 MR. GOLDBERG: And what about the third
15 point, bullet point on this document?

16 MR. SOCHOVKA: We just wanted it in
17 writing. Because after about a year of going through
18 these various tasks of having to go through all these
19 agencies and -- and -- and who's received the EISF and
20 who's on board and who's not on board, we just wanted
21 a statement from DCRA that they did receive all
22 clarifications from the 19 agencies, that they got
23 back their response and basically, if there was any --
24 anybody had any problems with the response --

25 MR. GOLDBERG: And were you advised either

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1 in this memo or otherwise of any environmental issue
2 that had been raised by any agency?

3 MR. SOCHOVKA: No.

4 MR. GOLDBERG: And, Mr. Reynolds, let me
5 have you take a look at Exhibit 3. I'm sorry.
6 Exhibit 4. And I'll ask you both, when's the first
7 time that you -- either one of you saw Exhibit 4?

8 MR. SOCHOVKA: For me, it was today.

9 MR. GOLDBERG: Right.

10 MR. REYNOLDS: Today.

11 MR. GOLDBERG: Okay. So, you were not
12 provided separately with a copy of this from the DCRA?
13 Is that correct?

14 MR. SOCHOVKA: No.

15 MR. GOLDBERG: And is the statement in
16 here -- the reference in paragraph one to the proposed
17 work as an enlargement correct?

18 MR. SOCHOVKA: No, it is not.

19 MR. REYNOLDS: No.

20 MR. GOLDBERG: Okay. And why is that?

21 MR. SOCHOVKA: Well, it's clearly stated
22 in previous testimony we are not enlarging our
23 facility. The facilities remain the same size and we
24 are in conforming use.

25 MR. GOLDBERG: Okay. Nothing further.

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1 CHAIRPERSON GRIFFIS: Good. Question, Mr.
2 Etherly.

3 MEMBER ETHERLY: Thank you very much, Mr.
4 Chair. That was -- that was a very helpful kind of
5 walk through. I want to hit a couple of real specific
6 things because I think for me at least this is a
7 relatively simple inquiry and I want DCRA to listen
8 closely because hopefully their presentation will
9 address some of these questions.

10 I -- I think the -- the outline here very
11 quickly is one I just want to run briefly, rapid fire
12 machine gun through the proposed work. I think the
13 simple question with respect to the work is do any of
14 these changes afford the appellant an opportunity to
15 expand their operations?

16 So, I'm going to run very quickly through
17 page four of your submissions. The -- the statement
18 essentially that outlines what you described in the
19 EISF and then I'm going to run very quickly through
20 the DOH issues. Because I think for me those are kind
21 of the outstanding pieces.

22 So, page four of the pre-hearing statement
23 outlines what you described in the EISF as the project
24 description. With respect to the weigh scale, I think
25 that's fairly straightforward to me. You need to --

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1 you need to implement, place a new scale in because
2 the existing the scale was -- was constantly breaking
3 down. Correct?

4 MR. REYNOLDS: That is correct.

5 MEMBER ETHERLY: Okay. Was that new scale
6 -- could it be described as being larger or
7 fundamentally different from the existing scale that
8 it was replacing and whoever would be appropriate to
9 answer that?

10 MR. REYNOLDS: Possibly more modernized as
11 to being able to weigh waste correctly.

12 MR. SOCHOVKA: Yes, it would --

13 MR. REYNOLDS: I don't know. I mean just
14 nothing major.

15 MR. SOCHOVKA: Technically more
16 modernized, but essentially the same -- the same size.

17 MEMBER ETHERLY: Does it -- gotcha. But,
18 does it allow me to move trucks in faster because it
19 is more modern?

20 MR. SOCHOVKA: No.

21 MEMBER ETHERLY: Okay. You're then
22 introducing a backup scale. A little bit of education
23 about the industry. Is it typical for facilities of
24 this type to have a backup scale?

25 MR. SOCHOVKA: It's typical for the

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1 facility to have two scales.

2 MEMBER ETHERLY: Okay.

3 MR. SOCHOVKA: But, yes, for the simple
4 reason that you do have one if one goes down.

5 MEMBER ETHERLY: Was it ever your
6 intention to have both of these scales operating
7 simultaneously? Such that you could -- where you used
8 to be able to simply have trucks come through on one
9 scale, by introducing a second scale into the
10 facility, was it your intent to use those two scales
11 at the same time so you could have two trucks coming
12 through at the same time being weighed?

13 MR. SOCHOVKA: I think our intention was
14 that we would use two scales. Not to have two come in
15 at the same time, but maybe to have one go out as one
16 came in.

17 MEMBER ETHERLY: Okay. So, conceivably or
18 arguably, that could enable you to move a little
19 faster through the trucks that are coming through.

20 MR. REYNOLDS: As long as --

21 MR. SOCHOVKA: Well, no, because it still
22 takes us time. We're only allowed so much space in
23 the facility.

24 MEMBER ETHERLY: Okay.

25 MR. SOCHOVKA: So, whether we brought in

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1 three trucks, those three trucks are still going to
2 take the same amount of time.

3 MEMBER ETHERLY: Okay. Okay.

4 MR. SOCHOVKA: So, it's not going to
5 really.

6 MEMBER ETHERLY: Okay. With respect to
7 the repair or replacement of the existing structural
8 steel, is that -- was that essentially just replacing
9 what was there or were you adding anything new in the
10 way of structural steel?

11 MR. REYNOLDS: Replacing what was there.

12 MEMBER ETHERLY: Okay. Nothing new being
13 introduced in terms of structural steel?

14 MR. REYNOLDS: No.

15 MEMBER ETHERLY: Okay. We talked about
16 the existing weight scale. The existing roof
17 structure. Similarly, snow storm damage. Were you
18 doing anything or adding anything new to the roof
19 structure other than simply replacing or repairing it?

20 MR. REYNOLDS: No, replacing just the --
21 it's damaged.

22 MEMBER ETHERLY: Okay. And then similarly
23 with respect to the existing siding, concrete floor,
24 and overhead doors, replacing or -- replacing damaged
25 doors or equipment.

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1 MR. REYNOLDS: Yes.

2 MEMBER ETHERLY: Or objects so to speak.

3 MR. REYNOLDS: Yes.

4 MEMBER ETHERLY: Okay. With respect to
5 the existing scale house and bathrooms, services need
6 replacement, once again defined as -- according to
7 your testimony, would you define that as simply
8 modernization as opposed to -- well, that's kind of
9 the obvious question, but simple modernization is how
10 you would characterize that?

11 MR. REYNOLDS: Yes. Yes.

12 MEMBER ETHERLY: Okay. Let me just then
13 to what is Exhibit Number 6 if I could in the -- in
14 the pre-hearing brief of the appellant. Exhibit
15 Number 6 is a July 14th letter from DCRA and in
16 particular references the D.C. Department of Health's
17 expression of a number of concerns and I want to hit
18 what I think were two -- the two essential part of the
19 DOH argument.

20 First was the issue of the -- the -- if I
21 understood correctly, the Air Quality Divisions visit
22 to the site on June 4th. There were specific
23 reference to the fact that there was -- they felt that
24 their visit revealed that there was going to be the
25 demolition of existing rooms and walls inside the

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1 facility and that that demolition would lead to your
2 ability to expand the capacity to store trash.

3 Okay. I'm reading -- paraphrasing
4 somewhat from the paragraph that falls under Air
5 Quality Division (AQD) on the letter dated July 14th
6 at Exhibit Number 6. You see that letter in front of
7 you?

8 MR. REYNOLDS: Yes. Yes.

9 MEMBER ETHERLY: Okay. You disagree with
10 that -- you disagreed with that characterization.

11 MR. REYNOLDS: Yes, I do.

12 MEMBER ETHERLY: Correct?

13 MR. REYNOLDS: Yes.

14 MEMBER ETHERLY: Okay. Was there a
15 demolition of existing rooms and walls inside the
16 facility that would result in the creation of a larger
17 open area space?

18 MR. REYNOLDS: No, there is not.

19 MEMBER ETHERLY: Okay.

20 MR. REYNOLDS: Because the -- the -- the
21 plans show that the same goes right back up to where
22 the existing is.

23 MEMBER ETHERLY: Okay. So, factually,
24 they were -- AQD was incorrect in characterizing the
25 planned work in that way?

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1 MR. REYNOLDS: That's correct.

2 MEMBER ETHERLY: Okay. Secondly, the
3 Water Quality Division continuing in the same letter
4 references the addition of an underground storage tank
5 and felt that -- that could -- I think the -- the
6 inference was that that could lead additionally to the
7 expansion perhaps in some -- in some capacity of the
8 facility. You also disagreed with that
9 characterization. Correct?

10 MR. REYNOLDS: Yes.

11 MEMBER ETHERLY: Okay. Why would the
12 introduction -- why was the introduction of an
13 underground storage tank necessary? Because there
14 wasn't -- be sure I'm clear. There was not a UST on
15 site before. Correct?

16 MR. SOCHOVKA: Right. What we did is we
17 worked with Water Quality on -- on their issues that
18 were -- that you have brought to our attention here.
19 The underground storage tank was originally put in
20 there -- in the reference of what happens in most of
21 these structures is when trucks come in in inclement
22 weather whether it be snow or rain, they usually get
23 onto the scale and that liquid, that snow melt, that
24 rain melt usually falls on the scale and sits there
25 and if it gets any freeze/thaw action, it causes

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1 damage to your scale.

2 So, the tank was introduced. It is a
3 modern facility to have a storage tank to collect that
4 and then obviously have to dispose of that to a -- to
5 a waste water treatment plant and we have the proper
6 permits that you would have -- would need to dispose
7 of that. So, that was the introduction to that.

8 The way we resolved it with Water Quality
9 was one, we just took the tank and we moved it above
10 ground and that was our response to Water Quality and
11 worked through that.

12 MEMBER ETHERLY: Okay. And essentially
13 all of your responses are then outlined in the letter
14 that is dated July 28th behind Exhibit Number 7.
15 Correct?

16 MR. SOCHOVKA: That is correct to a point.
17 Because there was other comments that we had to go in
18 after July 28th that we had to address.

19 MEMBER ETHERLY: Okay. They were specific
20 to DOH?

21 MR. SOCHOVKA: Specific to DOH.

22 MR. REYNOLDS: Yes.

23 MEMBER ETHERLY: Okay.

24 MR. SOCHOVKA: Yes.

25 MEMBER ETHERLY: And then moving to

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1 Exhibit Number 11, Exhibit Number 11 which is a
2 memorandum to Mr. Noble from the Office of
3 Enforcement, Compliance, and Environmental Justice
4 dated September 14th, does that represent the -- the
5 final communication that you are aware of from DOH
6 that expresses the satisfactory resolution in their
7 opinion of those outstanding issues?

8 MR. SOCHOVKA: That is correct.

9 MR. REYNOLDS: Yes.

10 MEMBER ETHERLY: Okay. Thank you. That
11 completes my questions, Mr. Chair.

12 CHAIRPERSON GRIFFIS: Excellent. Any
13 other questions from the Board?

14 VICE CHAIRPERSON MILLER: I think
15 obviously a key word in this case is expansion and I
16 think you articulated very well with respect to the
17 physical structure, how you were not expanding, but
18 you were fixing things and doing internal renovations
19 and I'm wondering with respect to your operations,
20 given the nature of your business, how it would be
21 evidenced that you were expanding your operations in
22 general? What would -- what would you be doing if --
23 if you had an expansion?

24 MR. REYNOLDS: I don't think. I'm not
25 part of operations. I don't think --

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1 MR. GOLDBERG: Florance is the best -- if
2 you wouldn't mind.

3 MR. FLORANCE: No.

4 MR. GOLDBERG: You may have Mr. Florance.
5 Is that okay?

6 MR. FLORANCE: My name is Dave Florance.

7 CHAIRPERSON GRIFFIS: Just have a seat.
8 Say it into the microphone. It'll pick it up.

9 MR. FLORANCE: Dave Florance F-L-O-R-A-N-
10 C-E.

11 MR. GOLDBERG: And what's your title?

12 MR. FLORANCE: I'm the Chief Operating
13 Officer for Northeast Waste. We own Eastern Trans
14 Waste of Maryland.

15 In our business, to expand, we would
16 enlarge the buildings. We would put more equipment in
17 and pardon me, more through put.

18 Where it's a little tough to define
19 sometimes in our business is we're -- we're faced with
20 seasonality. We'll do more waste in July than we do
21 in January just because there's more waste available.

22 I mean it's -- it's an ever flowing chart.

23 But, an expansion in our -- in our
24 business as we know it, we would enlarge the footprint
25 of the building which we had no intention in doing and

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1 maybe add a different pedestal where we could outbound
2 more trucks.

3 The volume that comes in, of course, has
4 to go out. We don't warehouse or store the material.

5 What we bring in on Monday, we ship out by Monday
6 night and that kind of controls what we can bring in
7 as far as a major influx. Because we have two areas
8 where we load tractor and trailers and that dictates
9 how much we can actually take in the front side and
10 what we can put out the back side.

11 So, if we were going to do an expansion
12 per se, we would enlarge the building, put another
13 pedestal in, another set of pit scales where you load
14 maybe two more tractor and trailers and that would
15 increase your through put.

16 Our -- our through put does vary slightly
17 based on seasonality.

18 VICE CHAIRPERSON MILLER: So, none of
19 these improvements or whatever you were doing would
20 affect the volume. Is that correct?

21 MR. FLORANCE: That's -- that's correct,
22 but it would -- it would make it a better work place
23 for our employees.

24 MR. SOCHOVKA: And we demonstrated that to
25 the inspectors that came on-site for the simple reason

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1 they asked the same question as you did. Because the
2 area that we're looking to -- to renovate, would any
3 waste go in that area and physically, you can't go in
4 that area. It's just basically for storage support
5 facilities that we have in there and our -- and our --
6 our break room and the bathrooms were located in that
7 area.

8 VICE CHAIRPERSON MILLER: Would it affect
9 your efficiency? The improvements that -- that you
10 wanted to make.

11 MR. FLORANCE: To a point yes.

12 VICE CHAIRPERSON MILLER: So, does that
13 efficiency affect the volume then of your work?

14 MR. FLORANCE: Not substantially. It
15 still doesn't -- I might be able to get it in just a
16 tad bit quicker, but I still can't take in more than I
17 can put out.

18 MR. SOCHOVKA: The -- the floor space
19 where you tip regulates what you can actually get in
20 there as I said before. Whether I can get three
21 trucks in there quicker than two trucks, they're still
22 going to take the same amount of time to dump.

23 COMMISSIONER HILDEBRAND: So, the trip
24 generation anticipated through the facility you don't
25 see that increasing?

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1 MR. FLORANCE: No more than historic
2 volumes and like I say, our business -- it's very
3 difficult for me to say, you know, we're going to do X
4 tons everyday five and a half days a week. Because
5 there's not as much waste available in January as
6 there is in June. Just historically, volumes drop in
7 the first quarter. They climb the second. Third is
8 vacations and the school kids come to the District --

9 CHAIRPERSON GRIFFIS: What kind of waste
10 are you moving through here?

11 MR. FLORANCE: And then the fourth, they
12 start to taper -- pardon me.

13 CHAIRPERSON GRIFFIS: What kind of waste
14 are you moving through here?

15 MR. FLORANCE: Solid waste and demolition
16 and construction material.

17 MR. GOLDBERG: Who are your customers for
18 example? The class of customers.

19 MR. FLORANCE: Oh, who we?

20 MR. GOLDBERG: Not -- not who they are,
21 but what -- in other words, you do -- you don't do
22 consumer waste. You do government --

23 MR. FLORANCE: No, I'm sorry. We do --

24 MR. GOLDBERG: -- and commercial.

25 CHAIRPERSON GRIFFIS: You do building

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1 materials?

2 MR. FLORANCE: Commercial. Yes,
3 commercial.

4 CHAIRPERSON GRIFFIS: Concrete. Things of
5 that nature.

6 MR. FLORANCE: No, not that stuff.

7 CHAIRPERSON GRIFFIS: None of that stuff.

8 MR. FLORANCE: No

9 CHAIRPERSON GRIFFIS: What sort of stuff?

10 MR. FLORANCE: Regular house --

11 CHAIRPERSON GRIFFIS: A layperson --

12 MR. FLORANCE: -- regular household trash.

13 CHAIRPERSON GRIFFIS: Right.

14 MR. FLORANCE: And construction
15 demolition. You know, you -- you remodel one of the
16 rooms in your home.

17 CHAIRPERSON GRIFFIS: Right.

18 MR. FLORANCE: It goes in a roll out box.
19 It comes to us.

20 CHAIRPERSON GRIFFIS: Right. Okay.

21 MEMBER ETHERLY: But, is that residential
22 construction demolition or would that also be --

23 MR. FLORANCE: Or it could be commercial.
24 To tell you the truth, it's really not -- C&D is the
25 -- is the logo used in the business. It could come

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1 from a high-rise. It could come from an apartment
2 building. It --

3 MEMBER ETHERLY: Okay. And just to come
4 back to Mrs. Miller's question and Mr. Hildebrand's
5 question, efficiency's a wonderful word. I mean, you
6 know, those of us in business enjoy that word, but it
7 also perhaps to an extent does suggest well, if you're
8 more efficient, aren't you in turn moving trucks at
9 least faster through that facility and -- and I mean
10 I'm trying to deal with that -- I want to make that
11 logical jump that if you're more efficient, it means
12 you're getting trucks through there. Of course --

13 MR. FLORANCE: Well, I -- I understand
14 where you're coming from, but this part of the
15 renovation also in the facility has nothing to do with
16 the current tip floor.

17 MEMBER ETHERLY: Um-hum.

18 MR. FLORANCE: So, we're not going to
19 enlarge our tip floor. We're not going to make it
20 more modern, faster.

21 MEMBER ETHERLY: Gotcha. Do you -- let me
22 ask you this.

23 MR. FLORANCE: Sure.

24 MEMBER ETHERLY: Do you look at -- do you
25 on a yearly basis or somehow take a look at what you

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1 do in terms of volume? Say can you look back to 2003
2 through 2001 and here's the volume that I did in the
3 first part of the season and when I know my volume is
4 going to be this and here's what the volume looked
5 like the second part of the season?

6 MR. FLORANCE: I can trend it if that's --

7 MEMBER ETHERLY: Okay.

8 MR. FLORANCE: Yes, I have -- I have
9 historical trends.

10 MEMBER ETHERLY: Got you. Do you do any
11 -- do you try to forecast? Okay. You can trend by
12 looking at what happened in the past. Do you also
13 forecast to an extent so --

14 MR. FLORANCE: Oh.

15 MEMBER ETHERLY: -- have you --

16 MR. FLORANCE: Yes, we have an operating
17 budget every year.

18 MEMBER ETHERLY: Okay.

19 MR. FLORANCE: Which -- which would be a
20 forward looking forecast of our business for the
21 current fiscal year.

22 MEMBER ETHERLY: Okay. Does that forecast
23 every year tend to include any type of shall we say
24 increased volume based on your experience and
25 familiarity with the business?

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1 MR. FLORANCE: We -- we always --

2 MEMBER ETHERLY: When you forecast, do you
3 try to bump up a little bit?

4 MR. FLORANCE: -- we always -- we always
5 try to find not necessarily more volume, but better
6 paying volume.

7 MEMBER ETHERLY: Okay. Okay. So, did you
8 do a forecast for 2004 and 2005?

9 MR. FLORANCE: Oh, absolutely.

10 MEMBER ETHERLY: Okay. So, let me ask it
11 a better way. Did you do a forecast post
12 construction?

13 MR. FLORANCE: No.

14 MEMBER ETHERLY: Okay. So, you --

15 MR. FLORANCE: I mean I have a -- I have
16 an idea in my mind.

17 MEMBER ETHERLY: Okay. Well, let's talk
18 about that idea very briefly. What was your idea post
19 construction?

20 MR. FLORANCE: There's -- there's a few
21 things -- there's a few things I like to hit on as far
22 as the post construction. There's some D.C. law that
23 requires that we seal it. We would be able to lock
24 down our building at night.

25 MEMBER ETHERLY: Um-hum.

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1 MR. FLORANCE: And one thing we wanted to
2 do was put an overhead door on it so we could do such.

3 MEMBER ETHERLY: Um-hum.

4 MR. FLORANCE: Two-thirds of our floor is
5 in fantastic shape where the operation actually -- the
6 actual transfer happens and there's a -- there's
7 another section of our floor that's in disrepair. We
8 need to have a, you know, permeable floor and those
9 were two of the key functions in our permit
10 application.

11 MEMBER ETHERLY: Um-hum.

12 MR. FLORANCE: It had nothing to do on,
13 you know, efficiencies or additional volumes. It had
14 to do with complying with the law and that -- and that
15 was a lot of it, but no, I have -- I have nothing or
16 have no forecast out there that say after this project
17 is done, I'm going to be able to take, you know,
18 another 100 tons a day through my facility.

19 MEMBER ETHERLY: Okay. Okay. Thank you,
20 Mr. Chair.

21 COMMISSIONER HILDEBRAND: And -- and we --
22 we were never given plans of the facility. I think we
23 understand that it occupies the entire footprint of
24 your lot. You're not adding new portals into the
25 building in anyway. You're -- you're simply replacing

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1 the ones that are currently damaged?

2 MR. FLORANCE: That's correct.

3 COMMISSIONER HILDEBRAND: And they're not
4 increasing in size. They're staying the same size.

5 MR. GOLDBERG: That -- that is also
6 correct and I believe we have a full set of plans
7 here. We didn't make exhibits, but we did say we
8 would bring them and they're here and we're happy to
9 put them up and, you know, it's -- here are the plans.

10 Here's the original package that DCRA sent back to us
11 at the time they the variance. So, we would submit
12 that if that's something that would be helpful to the
13 Board. So, you can have the plans if you want.

14 MR. FLORANCE: And it would show you our
15 working area versus the construction area. Because
16 actually most of the construction is going to take --
17 in fact, almost all of it's going to take place
18 outside the actual -- what we refer to as the active
19 tip floor which is simply where the trucks back up two
20 or three abreast, dump their material on the floor.
21 It's pushed to an escalator. It loads into the
22 tractor and trailer that takes it to, you know, a
23 designated subtitle D landfill.

24 MR. GOLDBERG: Can I hand this over to --

25 CHAIRPERSON GRIFFIS: Not necessarily.

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1 MR. GOLDBERG: Okay.

2 CHAIRPERSON GRIFFIS: If you put that in,
3 what I'm -- that's coming into the record. You're not
4 getting that back. What I'd suggest you do is if
5 there is a pertinent document like a site plan, I
6 think that would be the most important thing that we'd
7 need.

8 MR. REYNOLDS: Let me -- let me go back to
9 the car and get my copy. Because this one's the
10 permit copy.

11 CHAIRPERSON GRIFFIS: I going to need you
12 to be on -- on the mike.

13 MR. REYNOLDS: This goes through -- I want
14 this permit copy going back --

15 CHAIRPERSON GRIFFIS: I can't have you
16 talking if you're not onto a mike.

17 MR. REYNOLDS: Sorry.

18 MR. GOLDBERG: Sorry. We'll -- we'll
19 submit if -- we have a plan here. We have an extra
20 copy of sort of the -- what it was going to look like,
21 the work, if that would be helpful. A floor plan.
22 We'd be happy to submit that.

23 CHAIRPERSON GRIFFIS: Is that what you'd
24 like?

25 COMMISSIONER HILDEBRAND: Well,
I think it -- as long as I -- as the applicant has

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1 said on the record that they're not increasing the
2 capacity --

3 CHAIRPERSON GRIFFIS: If it's easily done,
4 let's do it.

5 COMMISSIONER HILDEBRAND: -- to ingress or
6 egress.

7 CHAIRPERSON GRIFFIS: If not, I don't see
8 a -- I think it's understandable though out point. I
9 mean really, the analogy that I'm looking at here is
10 it's kind of like a certificate of occupancy for a
11 building. So, you reconfigured the inside of the
12 building. It -- it wouldn't fundamentally change your
13 certificate of occupancy and that's the capacity of
14 people that could go in there.

15 Here the square footage of the volume of
16 the facility is limiting the volume waste that they
17 can get in and get out and that is the testimony.
18 Right now what we're hearing is that isn't changing.

19 Okay. What else? Any other questions of
20 the Board? Yes, Mr. Mann.

21 MEMBER MANN: I have a question. Perhaps
22 you introduced this earlier and maybe I just missed
23 it, but when you were talking about Exhibit 4, can you
24 explain to me what the -- why there's a reference and
25 what the reference is to 3202.5.b?

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1 MR. GOLDBERG: I'd have to -- let me take
2 a look. I don't remember. I know that they made a
3 mistake calling this a non-conforming use. So, I know
4 that that 2002.4 is not appropriate. That may relate
5 to that as well.

6 CHAIRPERSON GRIFFIS: 2002.4 goes to non-
7 conforming use. That's understood.

8 MEMBER MANN: Right. Right. But,
9 3205.5.b is on a different subject entirely.

10 MR. GOLDBERG: Let me -- let me take a
11 look. I think I have it here. I don't even have it
12 here. No, I -- I -- sitting here today, I don't know
13 exactly what that is. I'm sure I looked at it at the
14 time.

15 What -- what is the subject of that?

16 MEMBER MANN: Well, I mean it's briefly
17 summarized right there which is not exactly what it
18 says in the regulations, but it has to do with a
19 Zoning Commission decision on a minimum of a
20 commercial residential CR zone.

21 Well, I mean that particular zone I don't
22 think is actually called out in 3202.5.b, but it's
23 talking about an application filed after the date on a
24 -- on a Zoning Commission decision. It goes on for
25 several sentences.

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1 CHAIRPERSON GRIFFIS: But, this was
2 probably referring to the -- the overlay. Is that
3 what you're looking at, Mr. --

4 MEMBER MANN: Well, that's why -- well, I
5 don't know. That's why I don't understand why it's
6 referenced in there and perhaps -- perhaps DCRA is in
7 a better position to answer that since they're the
8 ones that originated the -- the letter, but I was just
9 wondering whether or not --

10 CHAIRPERSON GRIFFIS: Well, the appellant
11 addressed the timing of the overlay.

12 MR. GOLDBERG: Right.

13 CHAIRPERSON GRIFFIS: Is that correct, Mr.
14 Goldberg? I forget where that was, but it was going
15 to the dates and whether this was actually found to be
16 conforming within the -- within the -- the overlay
17 which we have submitted into the record.

18 Okay. So, we'll get -- you don't know
19 right off why they would have cited 3205.5.b?

20 MR. GOLDBERG: No, I don't.

21 CHAIRPERSON GRIFFIS: Okay. Good
22 question, Mr. Mann. Others? Any other questions?
23 Cross? No cross? Okay. Then I think we're set for
24 government presentation.

25 Let's take three minutes. Call our

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1 families. Tell them we're going to be late for dinner
2 and then we'll be right back and ready to do --

3 (Whereupon, at 6:17 p.m. off the record
4 until 6:29 p.m.)

5 CHAIRPERSON GRIFFIS: Very well. When
6 you're ready.

7 MS. BELL: Good evening. I actually want
8 to raise one provocative item. We're back to the
9 Federal lawsuit and the reason why I think it's
10 important because what ETW has -- has argued in the
11 Federal action is that the District has acted to --
12 intentionally has acted to diminish the value of ETW's
13 operation and at this particular facility as a result
14 of the baseball stadium.

15 Now, the reason why I think it's important
16 for this particular proceedings is whether or not this
17 Board determines that the modifications are necessary
18 or that a variance is not needed for the
19 modifications, will not affect the productivity or the
20 efficiency of the facility if the facility is actually
21 going to be closed and the property taken as a result
22 of eminent domain proceedings for the new baseball
23 stadium which is --

24 CHAIRPERSON GRIFFIS: I still don't
25 understand why we should be concerned with this.

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1 MS. BELL: Well, for two reasons, what
2 they've -- as I said, what they've argued and what
3 they've currently argued in -- in their Federal action
4 is that the District's action and the way that it's
5 handled this particular permit request --

6 CHAIRPERSON GRIFFIS: Right.

7 MS. BELL: -- is part of a plan to
8 diminish the value and capacity of the facility for
9 the purposes --

10 CHAIRPERSON GRIFFIS: No, I understood
11 what you said.

12 MS. BELL: Oh. Okay.

13 CHAIRPERSON GRIFFIS: But, it -- that -- I
14 would have expected that from the owner, you know,
15 preparing some conspiracy theory of why the
16 government's coming after them. Why are you
17 presenting that side?

18 MS. BELL: Well, not for the purposes of
19 the conspiracy.

20 CHAIRPERSON GRIFFIS: I should say not.

21 MS. BELL: Because obviously, there isn't
22 one, but for the purposes of mootness. In other
23 words, whether or not this -- this facility can be
24 modernized is now a moot issue.

25 CHAIRPERSON GRIFFIS: Why?

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1 MS. BELL: If the site has been identified
2 -- by their own admission and their pleadings, the
3 site has been identified --

4 CHAIRPERSON GRIFFIS: The pleadings in
5 this case?

6 MS. BELL: No, the -- the pleadings they
7 have filed in the Federal action which is --

8 CHAIRPERSON GRIFFIS: You're saying that
9 we should -- we should understand based on --

10 MS. BELL: Civil Action Number 0 --

11 CHAIRPERSON GRIFFIS: -- based on what
12 you're about to tell us is going on in the Federal
13 level, that there's actually no intention of the
14 appellant in this case to modernize and do the work
15 that they've proposed to do?

16 MS. BELL: At -- at this point, there is
17 -- there is none. Now, perhaps maybe when they
18 initially sought the building --

19 CHAIRPERSON GRIFFIS: Isn't that an easy
20 question to answer definitively? Can I ask Mr.
21 Goldberg if their -- if their intention is to conduct
22 this work?

23 MS. BELL: Well, he can't tell you. Well,
24 yes, we can ask him, but he can't tell you whether or
25 not. He can't make an honest representation at this

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1 point because the only person or the only entity that
2 can -- can make a definitive declaration one way or
3 the other would be the baseball stadium organization.

4 MR. GOLDBERG: We disagree.

5 MS. BELL: Now --

6 CHAIRPERSON GRIFFIS: I absolutely
7 disagree.

8 MS. BELL: Okay.

9 CHAIRPERSON GRIFFIS: And, in fact, I
10 don't understand the -- the whole premise of your
11 comments. If they -- if they -- you know, it's an
12 interesting point.

13 MS. BELL: They -- they believe that
14 taking --

15 CHAIRPERSON GRIFFIS: I talked to some
16 Board members about this. If they ask for a permit
17 right now to redo, to -- to paint and refinish their
18 entire facility, in fact, do it in copper with gold
19 leaf and put a slate roof on --

20 MS. BELL: Um-hum.

21 CHAIRPERSON GRIFFIS: -- if their property
22 is then purchased for some other project, that may
23 well be their money lost, but there's nothing
24 prohibiting them from doing that. Is there?

25 MS. BELL: Well, painting is something

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1 that can happen overnight, but with the changes that
2 -- that they've suggested in -- in this proceeding,
3 it's going to take a period of time.

4 Now, with regard to the -- as I said, with
5 regard to their own representation, they expect the
6 city to -- to -- as a result of eminent domain
7 proceedings take the property and --

8 CHAIRPERSON GRIFFIS: Mr. Goldberg, is
9 that what you expect?

10 MR. GOLDBERG: No, the -- the accurate
11 characterization is as follows. We believe that the
12 District assumes they will take the property.

13 Our belief which is even set forth in our
14 -- in the complaint she's referring to in one of the
15 paragraphs is that is far from a foregone conclusion.

16 If nothing else, there's an issue as to
17 whether the District has eminent domain power at all.

18 It's before the Supreme Court on a related case right
19 now. The Kelough case. That case may come out and
20 say that a similar type of taking is not a public use.

21 CHAIRPERSON GRIFFIS: And we're expecting
22 to see that remanded to us from the Supreme Court.

23 MR. GOLDBERG: The point -- the point is
24 that we do not --

25 CHAIRPERSON GRIFFIS: Leave that for

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1 another day. Right?

2 MR. GOLDBERG: Right. The point is that
3 we are not saying okay, yes, we know we'll be gone in
4 two months and that will be that at all. That's not
5 our case. It never was. Nobody knows what the future
6 will bring, but at this point and we can put it on the
7 record if it's helpful, the property is owned. The
8 property owner has been trying for a year and a half
9 to get the permit.

10 CHAIRPERSON GRIFFIS: Right.

11 MR. GOLDBERG: The property owner still
12 intends to do the work if and when they get the
13 permit.

14 CHAIRPERSON GRIFFIS: It seems to me a
15 very clear case as I have in terms of the submission.
16 That look, we have what is come into play as -- as
17 the -- what I used to and still refer to as the
18 Buzzard Point Overlay, the Capitol Gateway Overlay
19 which started years and years ago. Was then set down
20 and now has been adopted into the regulations and how
21 that plays into the existing facility and then this
22 whole request for a permit. That's what's of issue.

23 I don't -- I don't see where we're going
24 with Federal -- you know, what? Quite frankly in my
25 reading of this I don't see baseball as an issue of

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1 introduction here at all, but help me understand why
2 we'd be going there.

3 MS. BELL: Well, the only reason I raise
4 it is because whatever decision this Board's makes
5 and, in fact, I'm a little confused because as I
6 understand it from -- from my counterpart, what ETW's
7 arguing is actually that -- that DCRA and -- and the
8 District government is sort of a part of some
9 conspiracy to prevent them from getting a permit to
10 modernize the facility so that the value and output of
11 the facility remains the same at the time of this
12 "taking" which they're now saying potentially may
13 never happen.

14 I don't quite understand if potentially it
15 may never happen why are they filing a lawsuit? Why
16 are they arguing in the Federal court that the
17 District is engaged in an activity that -- that's
18 possibly illegal with regard to this particular
19 process. So, it's a -- it's a -- it's kind of like a
20 circular argument. They're -- they're sitting here
21 saying that they don't believe they're damaged, but
22 they're in the Federal courts that they do believe
23 they're damaged.

24 MEMBER ETHERLY: Well, Mr. Chair, I'm --
25 I'm very inclined to -- to -- not inclined. I agree

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1 with you wholeheartedly. I completely understand
2 where -- where Mrs. Bell's argument is coming from and
3 it -- it may very well perhaps in the back of their
4 minds be the appellant's strategy, but I don't
5 necessarily think that has any import or any
6 application in this particular proceeding.

7 If they want to undertake the expenses to
8 go through this and position themselves so they have
9 what could be argued a more -- a more lucrative asset
10 for consideration of takings if it is determined at
11 some point that the District can do that, you know,
12 then fine so be it, but I -- I just think it's a
13 little to attenuated for us to necessarily try to sort
14 out here.

15 I'm -- I'm extraordinarily comfortable
16 with continuing to move forward with trying to deal
17 with the questions that are before this body and let
18 whatever else is going to happen in other venues
19 happen.

20 But, I don't -- I don't see that
21 compromising or troubling --

22 CHAIRPERSON GRIFFIS: Certainly, the
23 Federal suit isn't based only in zoning issues. Is
24 it?

25 MS. BELL: Well, it's based on -- one of

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1 the things it's based on is how this Board finds. If
2 this Board allows them to have a permit and -- and --

3 CHAIRPERSON GRIFFIS: Well, we often have
4 courts especially Federal level look to us for our
5 decisions.

6 MS. BELL: Well, it --

7 CHAIRPERSON GRIFFIS: But, outside --

8 MS. BELL: -- well, it would be exhaustion
9 of --

10 CHAIRPERSON GRIFFIS: -- of that --

11 MS. BELL: -- administrative remedies. In
12 other words, they would --

13 CHAIRPERSON GRIFFIS: No, understood.
14 Understood.

15 MS. BELL: Okay.

16 CHAIRPERSON GRIFFIS: And in all
17 seriousness, I -- I do believe that things would be
18 based on what we do and that's obviously what we
19 always keep in the back of our mind, but it goes well
20 beyond just this simple zoning issue. Of course, that
21 would be our only jurisdiction.

22 MS. BELL: Um-hum.

23 CHAIRPERSON GRIFFIS: -- and so, I'm --
24 it's not -- it's not shocking to me that there might
25 be other arguments or other cases presented at a

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1 different forum or -- or especially at the Federal
2 level and I -- just, I guess, just say it again, I
3 think it would be difficult for us to step into
4 listening or understanding some of the arguments that
5 each the government or the property owner is making in
6 another forum in order to inform us for what I see is
7 a very straightforward and -- and frankly very
8 concisely put appeal that we're now looking at.

9 Ms. Miller.

10 VICE CHAIRPERSON MILLER: I just want to
11 make a couple of comments on this.

12 I mean I think the issue here is pretty
13 simple whether or not DCRA erred in denying the permit
14 and I don't think that that issue is moot yet because
15 of something that the DCRA characterizes as a likely
16 event that the District might take or what might
17 happen.

18 It hasn't happened yet. So, I think it's
19 still a live dispute and secondly, from the very
20 limited information that we have about what may be
21 pending in another court which was provided by the
22 appellant in Exhibit 12, it says that the District is
23 asking that the claims be dismissed in that court
24 because the issues are local in character and it seems
25 to me that you may be referring to this body which is

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1 local in character.

2 So, it doesn't make sense to me that both
3 would be dismissed for opposite reasons.

4 CHAIRPERSON GRIFFIS: Anything else?
5 Anybody else?

6 MS. BELL: Okay. We can go forward.

7 CHAIRPERSON GRIFFIS: Let's. Yes.

8 MS. BELL: Okay. All right. The two
9 issues then that we see as whether or not the Capitol
10 Overlay is an -- was an effective zoning
11 reclassification for this particular facility and the
12 second issue is whether or not it's an enlargement.

13 I'm going to ask Mr. Bello to address the
14 issue of the Capitol Gateway Overlay. I understand
15 the appellant has indicated that it is a conforming
16 use as a result of that reclassification.

17 MR. BELLO: Mr. Chair, good evening.
18 Board members.

19 Just for purposes of the record, I wanted
20 to read the definition for non-conforming use. I'm
21 well aware that the Board members are conversant with
22 it, but just for everybody's sake.

23 Section 199.1 defines a non-conforming use
24 as any use of land or of structure or of a structure
25 and land in combination lawfully in existence at the

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1 time that this title or any amendment to title became
2 effective that does not conform to the use provisions
3 for the district in which the use is located.

4 A use lawfully in existence at the time of
5 the adoption or amendment of this title would
6 thereafter require special exception approval from the
7 Board of Zoning Adjustment shall not be deemed a non-
8 conforming use.

9 I think the appellant's factual
10 representation is that the Zoning Administrator erred
11 in designing this a non-conforming use. For purposes
12 of the record, the appellant agrees that the current
13 zoning of a property as vested is Capitol Gateway
14 Overlay and also the Commercial Residential Overlay.

15 So, not only was there an imposition of an
16 overlay district on the subject property, there also
17 was a change, an amendment to the underlying zone.

18 So, to -- to reach the threshold of non-
19 conformity, one would have to not only look at the
20 impact of the overlay but also of the underlying zone.

21 Those have been mapped.

22 Whereas the overlay may consider existing
23 industrial users to be conforming, the underlying zone
24 in this respect prohibits the use and I'll refer you
25 to -- it'll be section 602.1 O -- subsection O, 602.1

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1 subsection O.

2 602.1 says the following users shall be
3 specifically prohibited in the CR Districts.
4 Subsection O tells us that any use first permitted in
5 the M District is prohibited.

6 I believe there's consensus that the --
7 the existing use here is a solid waster handling
8 facility and if we go to the use provisions of the M
9 District which is what this property used to zoned,
10 I'll refer you to the section in a minute, section
11 822.3 and -- and for point of reference, section 822
12 is special exceptions provisions of the M Districts.

13 822.3 any establishment to be used as a
14 solid waste handling facility shall be permitted only
15 in accordance with the following requirements.
16 Therefore, the -- the use of -- of a solid waste
17 handling facility is first permitted by special
18 exception in the M zone.

19 And if you read that in tandem with the
20 underlying CR zone in which the -- a permitted use
21 first permitted in the M District is prohibited, then
22 that makes this use a non-conforming use by
23 definition.

24 Now, the specific section under which the
25 application has been referred to you which under the

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1 non-conforming provisions and I'd like to read that
2 into the record also.

3 CHAIRPERSON GRIFFIS: Are you talking
4 about 3205?

5 MR. BELLO: I'm sorry.

6 CHAIRPERSON GRIFFIS: 3205 or 2002 --

7 MR. BELLO: No, this -- this will be 2002.

8 CHAIRPERSON GRIFFIS: Okay.

9 MR. BELLO: And the subtitle for -- for
10 that section is non-conforming uses within structures.

11 Section 2002 -- 2002.4 reads: Ordinary repairs,
12 alterations or modernizations may be made to a
13 structure or portion of a structure devoted to a non-
14 conforming use. Structural alterations shall not be
15 allowed except those required by other municipal law
16 or regulations provided the structural alternations
17 shall be permitted to a lawfully existing non-
18 conforming flat or apartment house located within the
19 residence district.

20 We know that's not the case we're dealing
21 with here.

22 So, the quest is -- is to question whether
23 the structural alterations to this premises is
24 required by some other municipal regulations and that
25 has not been represented here by the appellant.

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1 And if I -- if I may address the issue of
2 section 3205.a -- b actually. 3205.b is -- is the --
3 is what governs the vested rules. When the -- when
4 the Zoning Commission has set down a map amendment and
5 an application comes in after the date of that map
6 amendment, the more restrictive standards applies to
7 that application.

8 So, at the time of the application of the
9 appellant, the Capitol Gateway/CR Map Amendment was
10 vested on this property and so, the Zoning
11 Administrator is mandated to -- to review this
12 application under those regulations.

13 CHAIRPERSON GRIFFIS: Anything else?

14 MR. BELLO: That's it.

15 CHAIRPERSON GRIFFIS: Mr. Hildebrand, did
16 you have questions?

17 COMMISSIONER HILDEBRAND: I guess I'd like
18 to have your interpretation of the specific language
19 in the Capitol Gateway Overlay concerning the
20 grandfathering in of industrial uses as matter of
21 right or conforming uses, specific language.

22 Could you -- could you go to that section
23 and quote that for me too please?

24 CHAIRPERSON GRIFFIS: Section 1605. Is
25 that right?

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1 VICE CHAIRPERSON MILLER: 1605.1. I have
2 it. It's --

3 MR. GOLDBERG: I can give it to him. I've
4 got it right.

5 VICE CHAIRPERSON MILLER: Okay.

6 CHAIRPERSON GRIFFIS: Do you have it?

7 MR. GOLDBERG: Yes.

8 CHAIRPERSON GRIFFIS: Okay. Good.

9 MR. GOLDBERG: It's right here.

10 MR. BELLO: And I'll read that. This is a
11 commercial or industrial use that was permitted in the
12 M Zone District that is in existence with a valid
13 certificate of occupancy as of the date of the
14 provisions of this chapter first became effective
15 shall be deemed a conforming use, but shall not be
16 entitled to expand.

17 Well -- well, what you have here a
18 conflicting issue. You have an underlying zone that
19 appears to be more restrictive than a overlay zone and
20 I don't see any specific language in this overlay that
21 addresses that as to which takes precedence. When
22 it's not, then the Zoning Administrator must apply the
23 more restrictive standards.

24 COMMISSIONER HILDEBRAND: Well, when the
25 -- when the overlay is for a specific boundary and

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1 it's talking about CR in a specific area as opposed to
2 the city at large, I would think that that would be
3 considered the more restrictive language. Do you
4 think otherwise?

5 MR. BELLO: Yes, I disagree, sir. In
6 instances where there may be conflicts between an
7 overlay and an underlying zone, the regulations would
8 generally instruct which takes precedence.

9 COMMISSIONER HILDEBRAND: Why do you think
10 the commission would have specifically spoken to this
11 issue if it didn't consider this to be definitive?

12 MR. BELLO: I'd say an oversight on the
13 part of the Zoning Commission.

14 COMMISSIONER HILDEBRAND: And oversight or
15 an intention?

16 MR. BELLO: Well, that's subject to
17 debate. I mean we're -- we're talking about the
18 Zoning Administrator attempting to interpret the best
19 intentions of the Zoning Commission and then the
20 broader rule is the way you have a conflict between
21 two sections of the regulations. The more prohibitive
22 of those sections shall apply when not specifically
23 instructed.

24 COMMISSIONER HILDEBRAND: But, wouldn't
25 you agree that if a -- if an overlay was talking to a

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1 specific area as opposed to the city at large, my
2 definition it's more restrictive. It's not
3 comprehensive for the city. It's restrictive to an
4 area. So, it seems to me that you could also very
5 convincingly argue that that is a more restrictive
6 condition than the underlying zone.

7 MR. BELLO: Well, I mean your point is
8 well taken, but that -- that is to suggest that the CR
9 zone in the Capitol Gateway area are different from
10 other CR zones in the city and -- and that will be --
11 I think that runs contrary to the uniformity clause of
12 the Zoning Act.

13 COMMISSIONER HILDEBRAND: Isn't that the
14 entire purpose of the overlay? To grant additional
15 flexibility for zoning in -- in specific areas to
16 encourage certain things or discourage others.

17 MR. BELLO: Well, overlays are stand alone
18 zoning districts in themselves. At least as applied
19 by the Zoning Commission. So, the fact that there's
20 an overlay here which may serve to protect certain
21 interests in the -- in the geographic area does not
22 eliminate the uniformity clause of the Zoning Act
23 where the CR zone is perhaps viewed to be different
24 from other CR zone in the -- in the -- in other parts
25 of the city.

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1 COMMISSIONER HILDEBRAND: Thank you.

2 CHAIRPERSON GRIFFIS: Mrs. Miller.

3 VICE CHAIRPERSON MILLER: Mr. Bello, you
4 may have already answered this, but I -- I want to be
5 clear on it. In looking at the specifics of 1605.1,
6 can you tell me with respect to this particular type
7 of operation, is it first permitted in the CM or M
8 Zone Districts?

9 MR. BELLO: Solid waste handling facility?

10 VICE CHAIRPERSON MILLER: If that's how
11 this is characterized.

12 MR. BELLO: Sure. Well, I believe it is
13 permitted by special exception also in CM Zone.

14 VICE CHAIRPERSON MILLER: It's permitted
15 by special exception in the CM Zone and what about in
16 the M Zone? Is it permitted in the M Zone as a matter
17 of right?

18 MR. BELLO: By -- by special exception.

19 VICE CHAIRPERSON MILLER: Thank you.

20 MR. BELLO: You're welcome.

21 MEMBER ETHERLY: If I could, Mr. Chair,
22 just -- just a quick question on the 2002.4
23 interpretation because I'm going to still need some
24 help sorting out the first part of the argument
25 regarding the -- the more restrictive zone piece.

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1 With respect to 2002.4, so, is it -- is it
2 the District's intention that any type of structural
3 alteration has to be tied to a specific municipal law
4 or regulation?

5 MR. BELLO: Absolutely and I think that
6 you have to view that in the context of what the
7 intent of the regulations are, vis-a-vis nonconforming
8 uses.

9 The interest of the zoning regulations
10 quite frankly bring about the demise of non-conforming
11 uses.

12 To that extent, those sections are written
13 to be very restrictive as to allow structural
14 alterations. I don't think that there's -- there's
15 any argument here that the scope of work here meets
16 the threshold of a structural alteration.

17 MEMBER ETHERLY: Is there -- with respect
18 to that particular point, however, is there a
19 distinction within 2002.4 as it relates to the other
20 types of actions that are referred in that section?
21 Meaning if I were the appellant, would I argue or I
22 might be inclined to argue once again the EISF
23 consistently refers to repairs. By virtue of the fact
24 that 2002.4 by its terms in that second sentence
25 specifically refers to structural alterations, one

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1 argument that I might try to make is well, isn't that
2 setting out a distinction between ordinary repairs,
3 alterations or modernizations because of that seriatim
4 listing of the types of things that are allowed with
5 respect to a non-conforming use? If something can be
6 characterized as a repair does that take you out of
7 the scope of that second sentence?

8 MR. BELLO: Absolutely. Clearly, the
9 section permits what's deemed to be ordinary repairs,
10 alterations, and modernizations of the existing
11 structure.

12 MEMBER ETHERLY: Um-hum.

13 MR. BELLO: But, it prohibits the -- the
14 structural alteration of -- of such a structure.

15 MEMBER ETHERLY: So, it would be the
16 District's position that what we have here is not a
17 simple repair even though that's what the EISF is
18 stating, but rather you have structural alterations.

19 MR. BELLO: Yes, sir, from the Zoning
20 Administrator's standpoint, the office's determination
21 would -- would be related to the building permit
22 application and the plans submitted.

23 MEMBER ETHERLY: Um-hum.

24 MR. BELLO: And not so much the EISF
25 statement.

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1 MEMBER ETHERLY: And what in the -- in the
2 project description would you identify as a structural
3 alteration? If you go back to, for example, the
4 appellant's pre-hearing statement, the page that I
5 spent some time walking through, page four which lifts
6 in part the language that was placed on the EISF, what
7 in that list would you define as structural alteration
8 or would you -- or would the District define all of
9 that essentially as structural alteration? And once
10 again, that's construction of the one weight scale,
11 repair, replacement of existing structural steel. I
12 mean what in that listing would you identify as a
13 structural alteration?

14 MR. BELLO: Replacement of the existing
15 structural steel, replacement of existing structural
16 roof, existing concrete floor replacement.

17 MEMBER ETHERLY: Okay. Okay. And then
18 the second part of my question is with respect to the
19 continuation of 2002.4 in that second sentence except
20 those required by other municipal law or regulation,
21 you heard reference from one of the appellant's
22 representatives, and that might have been Mr.
23 Florance, speaking to the issue of a number of things
24 that were being done as part of an effort to insure
25 compliance with this existing regulation.

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1 I think it was perhaps with regard to the
2 specific issue of the -- it might have been the UST
3 and I can't recall what the other item was that we
4 spoke about. But, there was a reference to the fact
5 that some of the things that were being done were, in
6 fact, to remain in -- to insure continuing compliance
7 with existing regulations. What would the District's
8 response be to that -- to that argument?

9 MR. BELLO: Well, I mean it is not
10 inconceivable that -- that some of the work may be so
11 related, but then all of the work are not so related.

12 MEMBER ETHERLY: Um-hum.

13 MR. BELLO: Clearly, the -- the work
14 proposed here is to insure the longevity of this use
15 and that runs contrary to the interests of the zoning
16 regulations with respect to non-conforming uses.

17 MEMBER ETHERLY: Thank you. Thank you,
18 Mr. Chair.

19 CHAIRPERSON GRIFFIS: Yes.

20 VICE CHAIRPERSON MILLER: Just to hammer
21 this point one more time, I want to make sure I
22 understand your position. You're not saying that the
23 use is not permitted in this zone. Are you?

24 MR. BELLO: What I'm saying would be the
25 new zoning for the property which the Capitol Gateway

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1 underlines on CR does not permit the use. But,
2 because the -- the use predates the amendment, the map
3 amendment, they're deemed a non-conforming use from
4 the date of the vesting of their map amendment.

5 In other words, perhaps --

6 VICE CHAIRPERSON MILLER: They're -- to
7 me, they're two separate issues. Whether or not you
8 think that 1605.1 takes precedence over the other
9 regulations. I -- I -- I understand that argument.

10 Separate from that argument, when I'm
11 looking at the language in 1605.1, just looking at
12 that, do you believe that this is a use that's
13 permitted in this -- I believe that you said it was a
14 use that was permitted in the CM and M Zone by special
15 exception.

16 MR. BELLO: Correct.

17 VICE CHAIRPERSON MILLER: So, it is a
18 permitted use. Correct?

19 MR. BELLO: Sure. It is a permitted use
20 under the old zoning designation of the property and
21 if you go back to the reading of my definition of non-
22 conforming uses, it's tells you that a use lawfully in
23 existence prior to an amendment of the regulations
24 actually picks up the status of a non-conforming use
25 once that map amendment is vested.

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1 VICE CHAIRPERSON MILLER: Okay. My next
2 question is then do you believe they had a -- they
3 have a valid certificate of occupancy?

4 MR. BELLO: That's subject to debate, but
5 they do have a certificate of occupancy.

6 VICE CHAIRPERSON MILLER: That's the
7 second criteria in this regulation which I know you
8 say doesn't -- you don't believe applies, but what --
9 do you want to elaborate on that or not?

10 MR. BELLO: On --

11 VICE CHAIRPERSON MILLER: On whether --
12 why they would not have a valid certificate of
13 occupancy or why their certificate of occupancy would
14 not be considered valid?

15 MR. BELLO: Well, I'm -- I'm cautious
16 about that because I recognize that the city's been in
17 long-standing litigation with some of these facilities
18 and their manner of operation. But, that's not an
19 issue here.

20 The question you asked me was whether they
21 had a valid certificate of occupancy. I'm willing to
22 recognize that they have a certificate of occupancy.
23 I think whether it's valid or not may still be subject
24 to some legal outcome that I have no control over.

25 VICE CHAIRPERSON MILLER: That wasn't a

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1 factor in the -- in DCRA's --

2 MR. BELLO: Absolutely not.

3 VICE CHAIRPERSON MILLER: -- denial of the
4 permit?

5 MR. BELLO: Absolutely not.

6 VICE CHAIRPERSON MILLER: Okay. Thank
7 you.

8 COMMISSIONER HILDEBRAND: Does any of the
9 damage -- again, we haven't had purview of -- of the
10 proposed work plans, but does any of the damage that
11 they're trying to repair rise to the level of a
12 structural deficiency that would cause an -- an
13 occupancy hazard?

14 CHAIRPERSON GRIFFIS: Could you answer
15 that question in your class as Zoning Administrator?

16 COMMISSIONER HILDEBRAND: Oh, that's true.

17 MR. BELLO: Well --

18 COMMISSIONER HILDEBRAND: You're
19 absolutely right. Sorry.

20 MR. BELLO: -- well, I -- I really can't
21 because I didn't personally review the plans and
22 actually find it odd that the appellant did not --

23 CHAIRPERSON GRIFFIS: Right. But, I think
24 the pertinent point in what your question is going to
25 is what your testimony actually stated is that you did

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1 not see -- if I'm correct in understanding it, you did
2 not see evidence of any agency or department requiring
3 the work. Is that correct?

4 MR. BELLO: Absolutely. That's correct.

5 CHAIRPERSON GRIFFIS: Okay. What else?
6 Anything else?

7 VICE CHAIRPERSON MILLER: Well, my
8 understanding is that the permit was denied because
9 the work was perceived by DCRA to involve an expansion
10 and can you -- is that correct?

11 MR. BELLO: Absolutely not. If you read
12 -- if you read the text of the section under which
13 they've been referred to the Board of Zoning
14 Adjustment, there's nothing in there about expansion.
15 That only speaks to structural alteration.

16 CHAIRPERSON GRIFFIS: 2002.4. Okay.
17 Anything else from the Board? Ms. Miller.

18 VICE CHAIRPERSON MILLER: Sorry. Maybe
19 it's the late hour, but is -- is structural
20 alterations defined somewhere or differentiated
21 between what's a structural alterations and what's a
22 modernization or what -- or the other -- or a repair
23 or alteration?

24 MR. BELLO: Not specifically, but I think
25 that our professional training makes us understand

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1 when the structures are built and is being altered or
2 moved and here we're talking about moving steel beams,
3 roofs. Those are structural elements of that
4 building.

5 VICE CHAIRPERSON MILLER: So, does that
6 mean a roof can't be repaired if something happens to
7 it? For instance, they say because of snow storm or
8 something. They can't repair their roof because
9 that's a structural alteration.

10 CHAIRPERSON GRIFFIS: Can I just go
11 directly to the text of 2002.4 to answer the question
12 where it starts out ordinary repairs, alterations, and
13 modernizations. Mr. Bello, your testimony to the fact
14 that your professional knowledge and convention of
15 construction and design leads you to an understanding
16 of the difference between repairs, alterations, and
17 modernizations and structural alterations. Is that
18 correct?

19 MR. BELLO: That's correct, sir.

20 CHAIRPERSON GRIFFIS: Okay. So, the
21 direct answer to the question now then is a roof
22 repair is covered under 2002.4?

23 MR. BELLO: Well, a roof repair's may be
24 covered to the extent that you need to replace the
25 main beam of a roof.

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1 CHAIRPERSON GRIFFIS: Right.

2 MR. BELLO: But, when you're removing the
3 structural elements of that roof, then that's --
4 that's --

5 CHAIRPERSON GRIFFIS: It becomes a
6 structural alteration.

7 MR. BELLO: Absolutely.

8 CHAIRPERSON GRIFFIS: Okay.

9 MS. BELL: I -- I don't -- I don't know if
10 -- we've -- we've talking about this, but I don't know
11 if we added all the language. In -- in their
12 submission, they indicate that the roof -- it's the
13 roof and the substructure as well as the six or seven
14 other items.

15 So, it might be helpful. For the record,
16 they want to construct one weight scale. That's a new
17 50 pound weight scale. They want to replace existing
18 structural steel. They want to repair the existing
19 weight scale.

20 CHAIRPERSON GRIFFIS: Right. That's not
21 lost on me. Is everyone following that? Yes, I think
22 we fully understand the -- the scope of work that's
23 being proposed.

24 MS. BELL: All right.

25 CHAIRPERSON GRIFFIS: Okay. Ms. Miller,

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1 was your questioning -- did you have follow-up?

2 VICE CHAIRPERSON MILLER: One more
3 question. I see what you're saying with respect to
4 the referral that it references -- it needs to have
5 BZA approval because it's a structural alteration. Is
6 that evident in any of the other -- any of the
7 correspondence to the appellant?

8 MR. BELLO: Which specifically?

9 VICE CHAIRPERSON MILLER: That -- that the
10 permit's being denied because this is a structural
11 alteration.

12 MR. BELLO: Okay. Let me try to explain
13 that. Because I think that perhaps you're -- you're
14 paying undue attention to the language, the precursor
15 language to that referral letter.

16 The -- and -- and clearly here, the
17 correspondence of pertinence would only be the one
18 between the Zoning Administrator and the applicant and
19 not the EISF, the EIS correspondence.

20 But, the section under which a referral is
21 -- is given is the substantive part of a referral and
22 2002.4 it's very clear in its language notwithstanding
23 that the word enlargement was employed here, but the
24 Zoning Administrator's determination again will have
25 nothing to do with potential enlargement of the

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1 existing use.

2 VICE CHAIRPERSON MILLER: I didn't follow
3 that. You said they use the word enlargement, but it
4 had nothing to do with the enlargement of what?

5 MR. BELLO: I'm not sure I understand your
6 question. Your question was whether there was some
7 use of the word enlargement in correspondence with the
8 applicant?

9 VICE CHAIRPERSON MILLER: No, my question
10 is I think that you've stated here that it was
11 referred to the BZA because this involves a structural
12 alteration pursuant to 2002.4.

13 MR. BELLO: Correct.

14 VICE CHAIRPERSON MILLER: My question to
15 you was with respect to the correspondence between
16 DCRA and the appellant, is there any indication there
17 that the permit was being denied because it was a
18 structural alteration which wasn't allowed pursuant to
19 this provision?

20 MR. BELLO: I'm not sure what specific
21 correspondence you refer to, but the correspondence of
22 relevance here which is the determinant factor in --
23 in the disposition of an application is the referral
24 that is generated as a result of the review of that
25 application and -- and that's a copy of that referral

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1 which is the Zoning Administrator's memo.

2 So, there -- there -- my point is there --
3 there isn't requirement in the zoning regulations that
4 an applicant be pre-informed in a letter that they
5 were enlarging.

6 VICE CHAIRPERSON MILLER: I guess my
7 general understanding of this case is that there was a
8 lot of correspondence about the issue of whether or
9 not this was an enlargement and that they were being
10 denied the permit because it involved an enlargement
11 and that they had the opportunity to respond over
12 several months to show you why it wasn't an
13 enlargement and if you're saying to me that no, that's
14 not the reason the permit was denied. It's being
15 denied because it's a structural alteration. It seems
16 like that should have been corresponded to the
17 appellant previously so they would have had the
18 opportunity to say yes or no, this isn't a structural
19 alteration.

20 MR. BELLO: Well, I can provide a bit of
21 an explanation and background to that. Clearly, this
22 application was in process before I -- I became the
23 Zoning Administrator. So, I pretty much dealt with
24 this application towards the tail end of -- of the
25 process.

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1 Do I find questionable some of the
2 correspondence that has exchanged hands between --

3 MS. BELL: I -- I think I -- if I could
4 interject, you know, it was during a time when Denzel
5 Noble was acting as both the Acting Zoning
6 Administrator and the BLRA Administrator.

7 CHAIRPERSON GRIFFIS: Well, let's go to
8 the pertinence. We have an appeal before us. Is it
9 -- it is a requirement that the -- that you would have
10 notified at some point or have you -- have you mislead
11 the appellant in this case of what actual relief they
12 needed to seek before the BZA.

13 MS. BELL: Well, the reason why I jumped
14 in is because when Mr. Noble sent correspondence --

15 CHAIRPERSON GRIFFIS: Right.

16 MS. BELL: -- he did not make -- he did
17 not distinguish whether he was raising zoning issues
18 or BLRA issues because he was wearing two hats and so,
19 some of the correspondence that -- that you see here
20 in this case --

21 CHAIRPERSON GRIFFIS: I don't want to get
22 wrapped to -- wrapped to tightly around --

23 MS. BELL: Okay.

24 CHAIRPERSON GRIFFIS: -- this because look
25 the Exhibit Number 10, October 12th, Denzel Noble's

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1 letter, second point. The first point is a letter of
2 referral which is sent under separate cover. We
3 already have testimony that there nothing attached.

4 The second point says statement regarding
5 the reduced scope of work at this location that would
6 not require BZA approval. That's direct zoning and he
7 starts saying well, if you didn't increase machinery
8 or equipment or the square footage or operation, that
9 goes directly to expansion.

10 I mean I'm not surprised that we were
11 prepared to hear a whole lot of testimony and argument
12 on expansion and so, I think what Ms. Miller is really
13 directly stating is that this whole argument that
14 starts with section 602 leads us to 822 which gets us
15 to 2002 which then gets us into 35 or 3205 is a
16 fascinating argument that now needs digestion, but it
17 comes as a surprise to me and so, I cannot imagine
18 that Mr. Goldberg is prepared to -- to address all of
19 it tonight.

20 COMMISSIONER HILDEBRAND: I guess I have
21 one follow-up question. If -- if you -- if one was to
22 consider, what is it, 1605.1 to be designating this
23 use as a conforming use, would then not 2002.4 not
24 apply? And then --

25 MR. BELLO: Absolutely correct, sir.

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1 COMMISSIONER HILDEBRAND: Okay. So, that
2 is part of the question as well.

3 CHAIRPERSON GRIFFIS: I'm sorry. What
4 would not apply if 1605.1 did?

5 COMMISSIONER HILDEBRAND: 2002.4

6 CHAIRPERSON GRIFFIS: 2002.4.

7 COMMISSIONER HILDEBRAND: Which is the
8 restriction that you couldn't do structural repairs to
9 a non-conforming use.

10 CHAIRPERSON GRIFFIS: Exactly and I think
11 that was well put together before us. We now have
12 obviously a counter argument to it.

13 Okay. Other substantive questions at this
14 point? No? Okay.

15 Where are we then? Anything else on this?

16 MS. BELL: No, other than the government
17 does concede that there was an error made. We agree
18 with the appellant with regard to the OP report. We
19 understand that the OP report did incorrectly identify
20 the ten extra employees as part of their analysis.

21 CHAIRPERSON GRIFFIS: Okay. Was that the
22 basis of not issuing a permit?

23 MS. BELL: No. No, because our -- because
24 our argument is that it -- it was not part of the
25 consideration for the Zoning Division, but -- but

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1 obviously, that's something that they've raised.

2 CHAIRPERSON GRIFFIS: Okay.

3 VICE CHAIRPERSON MILLER: I have to ask
4 one more question. Is there any other documentation
5 that the -- the Zoning Division considered 2002.4, the
6 rationale that you're addressing today with respect to
7 structural alterations, as the reason for the denial
8 of the permit?

9 MS. BELL: I think Mr. Bello can best
10 answer that.

11 MR. BELLO: That determination is squarely
12 mine given the time at which I came into the
13 application and -- and the overview of the review of
14 one of my review staff.

15 VICE CHAIRPERSON MILLER: When did you
16 make that determination?

17 MR. BELLO: Within a week of seeing the
18 application.

19 VICE CHAIRPERSON MILLER: Well, when? Can
20 you give me a date? Just a -- a month?

21 MR. BELLO: I'm not the best with dates,
22 but the -- obviously, the application I believe had
23 been lying around for awhile and as soon as I assumed
24 responsibility for that office, my tech reviewer
25 approached me with the application. I simply based on

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1 my interpretation of the regulations told her to draft
2 a letter for referral to the BZA. Based on --

3 VICE CHAIRPERSON MILLER: Well, we can go
4 by the date of the -- date of the memorandum at least.

5 MR. BELLO: Sure.

6 VICE CHAIRPERSON MILLER: November 3rd,
7 2004.

8 MR. BELLO: Absolutely.

9 VICE CHAIRPERSON MILLER: Okay. Thank
10 you.

11 MR. BELLO: Right.

12 CHAIRPERSON GRIFFIS: What else? Anything
13 from the Board? Okay. Finished?

14 MS. BELL: Yes.

15 CHAIRPERSON GRIFFIS: Excellent. Thank
16 you all very much.

17 Mr. Goldberg.

18 MR. GOLDBERG: Thank you. Good evening,
19 Mr. Bello.

20 I notice you did not have 1605.1 with you
21 in your regulations tonight. Is that correct?

22 MR. BELLO: Answer that.

23 MS. BELL: I -- I do.

24 MR. BELLO: Well, actually, these
25 regulations belong to the General Counsel and

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1 obviously, their's are not up -- as up-to-date as mine
2 are, but that is not to say that the division is not
3 cognizant of the existence of the Capitol Gateway
4 Overlay.

5 MR. GOLDBERG: Well, when is the first
6 time you saw 1605.1? Was it tonight?

7 MR. BELLO: Absolutely not. I believe I
8 saw it -- perhaps -- I saw it when I was working with
9 the Board of Zoning Adjustments here.

10 MR. GOLDBERG: So, that would be before
11 November 3rd?

12 MR. BELLO: Way before November 3rd. Yes.

13 MR. GOLDBERG: And did you make a specific
14 determination for purposes of ETW's permit application
15 that you decided that this was a non-conforming use as
16 opposed to a conforming use under 1605.1?

17 MR. BELLO: Absolutely.

18 MR. GOLDBERG: And when did you make --
19 when did you make that determination?

20 MR. BELLO: At the time that I was
21 approached by the review technician which would be
22 close -- within a week of the date of this referral
23 memo.

24 MR. GOLDBERG: And just to clarify I think
25 from Mr. Hildebrand's question, that if 1605.1 is

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1 deemed to apply by the Board, then you would agree
2 that the question of whether 2002.4 would apply is a
3 -- is a -- not a relevant question? Is that correct?

4 MR. BELLO: Oh, absolutely.

5 MR. GOLDBERG: Okay. Now, let's take a
6 look at 2002.4. That talks about structural
7 alterations. Is that correct?

8 MR. BELLO: That's correct.

9 MR. GOLDBERG: And it does talk about
10 alterations made to a structure in the first sentence.
11 Ordinary repairs, alterations or modernizations may
12 be made to a structure or portion of a structure
13 devoted to a non-conforming use. Is that correct?

14 MR. BELLO: That is correct.

15 MR. GOLDBERG: So, some alterations can be
16 made to a structure --

17 CHAIRPERSON GRIFFIS: Sorry. Your mike
18 went off for some reason.

19 MR. GOLDBERG: Oh, sorry. Some
20 alterations can be made to a structure without it
21 being a -- a structural alteration. Is that correct?

22 MR. BELLO: That is possible.

23 MR. GOLDBERG: Now, let's take a look at
24 the definition of structure which you have to go back
25 to -- let's see. It's on page 126 in my copy. It's

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1 in the definitions at the very beginning of the Title
2 11 and it specifically states that the term structure
3 shall not include mechanical equipment, but shall
4 include the supports for mechanical equipment. Are
5 you familiar with that definition?

6 MR. BELLO: Absolutely.

7 MR. GOLDBERG: So, would you agree with me
8 that a -- a scale is mechanical equipment?

9 MR. BELLO: Absolutely.

10 MR. GOLDBERG: So, if you put in a scale,
11 that's not a structural alteration. Is it?

12 MR. BELLO: I agree.

13 MR. GOLDBERG: Okay. Now, are you
14 familiar with the regulations that your agency has
15 promulgated with respect to -- either that or the D.C.
16 Counsel rather, with respect to the solid waste
17 transfer facilities?

18 MR. BELLO: As reflected in the zoning
19 regulations or in terms of --

20 MR. GOLDBERG: Not zoning regulations.
21 Title 21 specifically

22 MR. BELLO: No, I'm not.

23 MR. GOLDBERG: Section 7. Okay.

24 MR. BELLO: No, I'm not.

25 MR. GOLDBERG: Are you aware that section

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1 731.15e provides that proposed solid waste facilities
2 shall be constructed or an existing facility shall be
3 modified so as to prevent diseased vectors from
4 entering the building through the facility's
5 foundation, roof, exterior walls, doors or conduits?

6 CHAIRPERSON GRIFFIS: Is this Title 21?

7 MR. GOLDBERG: Yes, it is.

8 CHAIRPERSON GRIFFIS: You just asked him
9 if he was familiar and then you read him a section and
10 asked he was familiar with the section?

11 MR. GOLDBERG: Well, I'm asking whether
12 he's familiar with the general obligation of the solid
13 waste facility that have such a structure.

14 CHAIRPERSON GRIFFIS: Under Title 21.

15 MR. GOLDBERG: Right.

16 CHAIRPERSON GRIFFIS: Mr. Bello?

17 MR. BELLO: No, I'm not.

18 MR. GOLDBERG: Okay. Does it make sense
19 to you that if -- if your agency requires that there
20 be such a roof to prevent disease vectors from
21 entering the building that that roof would need to be
22 impermeable?

23 MR. BELLO: I agree.

24 MR. GOLDBERG: So, if a roof needs to such
25 that it doesn't leak, would you agree with me that

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1 that is something that D.C. law requires?

2 MR. BELLO: I agree.

3 MR. GOLDBERG: Okay. Another provision --

4 MS. BELL: Well, I'm going to object to
5 this line of questioning because it -- it really is
6 forcing him to make an assessment about regulations he
7 hasn't had a chance to review and it also -- you know,
8 the solid waste transfer stations have been the
9 subject of a lot of litigation. There's a lot of
10 legislative intent tied up in -- in the regulations
11 and so, I think it's a little -- a little difficult to
12 balance that against the obligations for the zoning
13 regulations.

14 Whether or not there's a -- a roof has
15 nothing to do with whether the roof requires a
16 substructure and a whole lot of other things.

17 CHAIRPERSON GRIFFIS: What's the heading
18 of Title 21?

19 MS. BELL: It's the solid waste section.
20 Is it not?

21 MR. GOLDBERG: Solid Waste Control.

22 CHAIRPERSON GRIFFIS: The whole title is?

23 MR. GOLDBERG: Solid Waste Control. I'm
24 sure.

25 CHAIRPERSON GRIFFIS: Twenty-one?

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1 MR. GOLDBERG: Um-hum.

2 CHAIRPERSON GRIFFIS: And what's the
3 regulatory agency that enforces Title 21?

4 MR. GOLDBERG: DCRA.

5 CHAIRPERSON GRIFFIS: And the subagencies
6 that look at it?

7 MR. GOLDBERG: The subagencies that look
8 at it?

9 CHAIRPERSON GRIFFIS: Is the Department of
10 Health involved?

11 MR. GOLDBERG: Department of Health might
12 get involved. Sure.

13 CHAIRPERSON GRIFFIS: Okay.

14 MR. GOLDBERG: Certainly Department of
15 Public Works.

16 MS. BELL: Yes, DPW and it's like three or
17 four agencies.

18 MR. GOLDBERG: Right.

19 CHAIRPERSON GRIFFIS: Indeed. I tend to
20 agree with the objection in terms of making on the
21 spot determinations -- zoning determinations based on
22 a Title 21 that Mr. Bello has already indicated that
23 he's not familiar with.

24 I think if these -- obviously, if these
25 agencies would have informed the -- the Zoning Branch

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1 of the Zoning Administrator as to requirements, but I
2 haven't heard those kind of questionings. Whether
3 there was actual evidence of requirements under 21
4 that would have impacted a review. Unless that's
5 where you're going with it.

6 MR. GOLDBERG: Well, I believe on direct
7 one of our witnesses did say, in fact, that some of
8 these changes were required to comply with D.C. law.

9 Then I believe on -- on the government's
10 case, we heard statements that we didn't say that and
11 then we heard allegations that frankly are different
12 than the explanation issue. That this is a -- a
13 structural alteration.

14 So, we're responding to that by putting
15 out on the record the fact that -- in fact, they're
16 not structural alterations for three reasons. One is
17 because they don't fall in the definition because
18 they're really just an alteration to a structure.
19 These aren't significant types of changes that would
20 be that.

21 But, second of all, I'm not sure you need
22 to go there because as the witness has already said,
23 the scale is not a structural alteration. So, that's
24 completely out of this whole 2002.4 equation.

25 Then you get to basically many of the

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1 other changes deal with a -- a floor that is permeable
2 and a roof that is not permeable and siding and
3 there's specific provisions that address that.

4 CHAIRPERSON GRIFFIS: Direct me to it
5 then. Where was it evidenced? Is there an exhibit
6 that shows that it was a requirement? There was a
7 code violation. There was something of hard evidence
8 that was established. This -- the work -- the scope
9 of work was required to meet some applicable code.

10 MR. GOLDBERG: We can submit evidence. We
11 didn't because again the issue that was presented was
12 that it was an improper enlargement or an expansion.

13 CHAIRPERSON GRIFFIS: Okay. And I
14 understand that.

15 MR. GOLDBERG: Right.

16 CHAIRPERSON GRIFFIS: But, here's --
17 here's what I'm faced with in looking at all the
18 evidence at this point. Mr. Bello said nothing was
19 presented to him in terms of evidence that this was a
20 requirement to meet municipal codes. You're saying
21 well, you do have them. We're just at a back and
22 forth.

23 So, I think at some point that we would
24 show some -- some hard evidence on that.

25 MEMBER ETHERLY: Yes, I would agree with

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1 you, Mr. Chair. I -- there's nothing that I see in
2 the submittal that would suggest that there was an
3 explicit statement on the part of the appellant and in
4 the -- the EISF submittals that connected this to --
5 to a specific regulation or requirement and I don't
6 perhaps means to turn this into a reverse cross on the
7 appellant.

8 CHAIRPERSON GRIFFIS: Sure.

9 MEMBER ETHERLY: Because I'm still -- and
10 I'm just going to shut up. I'm still struggling with
11 -- to get to 2002.4, you still have to -- you have to
12 find that this is a non-conforming use and I still
13 don't understand that argument yet.

14 MR. GOLDBERG: And we don't -- and we
15 don't want to accept that argument. We're trying to
16 cover the bases, but --

17 MEMBER ETHERLY: Okay.

18 MR. GOLDBERG: -- but, we don't accept
19 that argument. In fact, I would ask the witness to
20 take a look Exhibit 5 on that issue.

21 Now, we're not shy and now, the government
22 agrees that the Office of Planning got something
23 desperately wrong in this argument, but we would
24 submit -- I would submit to the witness and see if he
25 agrees that the Office of Planning assumed this was a

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1 conforming use. Didn't they in the third paragraph?
2 Don't they specifically state that the Capitol Gateway
3 Overlay states that existing industrial uses with
4 valid certificate of occupancy shall be deemed
5 conforming use, but are not entitled to expand?

6 So, the Office of -- my question is the
7 Office of Planning agreed with our position that this
8 is a conforming use. Didn't it?

9 MR. BELLO: Well, they may have, but they
10 do not have the statutory responsibility for
11 interpreting the zoning regulations and I think
12 records abound on disagreements over zoning
13 interpretations between Zoning Administrator's Office
14 and the Office of Planning.

15 MR. GOLDBERG: You'll agree that there's
16 no indication of your thought process in any document
17 that has been presented to the Board in this case as
18 to a determination by you that this was a non-
19 conforming use as opposed to a conforming use.
20 Correct?

21 MS. BELL: You know, I -- I will take the
22 hit for that and I intended to ask the Board for an
23 opportunity to memorialized our statements.
24 Unfortunately, we have gotten records in an untimely
25 fashion and that's not related to the appellant and

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1 so, as a result, we were not able to memorialize his
2 statements to this date.

3 CHAIRPERSON GRIFFIS: But, you intend to
4 in some fashion?

5 MS. BELL: Yes, I do. That was something
6 I was going to ask at the conclusion.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. GOLDBERG: Are you familiar with --
9 you -- you referred to language about a special --
10 special exception process for solid waste transfer
11 facilities in an M District. Do you remember that
12 testimony?

13 MR. BELLO: That's correct, sir.

14 MR. GOLDBERG: For example, that would
15 include the 300-foot setback?

16 MR. BELLO: That's correct.

17 MR. GOLDBERG: And do you know when that
18 was put into place? Became effective.

19 MR. BELLO: When the regulations were
20 amended?

21 MR. GOLDBERG: Right.

22 MR. BELLO: I don't remember the exact --
23 the exact date, but I know it's at least easily seven
24 years old.

25 MR. GOLDBERG: Right. It's in the 1990s.

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1 The latter part of the 1990s.

2 MR. BELLO: Exactly.

3 MR. GOLDBERG: Are you familiar when
4 Eastern Trans Waste starting using the facility for a
5 solid waste transfer facility?

6 MR. BELLO: I can't say I remember Eastern
7 Trans Waste particularly, but I -- I remember in
8 general the issues that we had with how these uses
9 came to be established prior to the amendment of the
10 regulations to create this use classification.

11 MR. GOLDBERG: So, it was a preexisting
12 use prior to the special exception process coming into
13 law. Is that correct?

14 MR. BELLO: That's correct.

15 MR. GOLDBERG: Just give me a moment if
16 you would.

17 MEMBER ETHERLY: In the interim, Mr.
18 Chair, let me take an opportunity to jump in with a
19 question of Mr. Bello.

20 With respect to -- there was a question
21 regarding where you have two provisions that are
22 conflicting, I recall there is language somewhere that
23 speaks to that. Do you recollect what that language
24 is in the zoning regs where you have two seemingly
25 conflicting zoning designation? How you would

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1 necessarily resolve that, i.e. -- or -- or is that
2 simply --

3 MR. BELLO: Actually, I believe that it's
4 -- it's a court opinion.

5 MEMBER ETHERLY: Okay.

6 MR. BELLO: I'm sure that General Counsel
7 show be able to provide you with that.

8 MEMBER ETHERLY: Okay. Okay. If we could
9 -- if our legal counsel could take a look at that,
10 that would be helpful for me. Thank you.

11 MR. BELLO: Thank you.

12 MR. GOLDBERG: Nothing further.

13 CHAIRPERSON GRIFFIS: No further cross?
14 Okay. I'm -- I'm sorry. Mr. Etherly, you were
15 looking for the provision that says in -- in the
16 zoning regulations you defer to the -- the more
17 restrictive where two are in conflict. Is that
18 correct? Is it not interpretation and application
19 101? That's my first guess. That's all. I may be
20 mistaken.

21 MR. GOLDBERG: Do you want to borrow mine
22 again? There you go.

23 CHAIRPERSON GRIFFIS: All right. Well,
24 we'll find it and cite it somewhere. I don't think it
25 is. Okay.

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1 We're at 7:30. We would not go to calling
2 all the other people that are filling the room for
3 their -- well, okay. There's no one else in the room
4 but you guys. But, we can go to closings right now or
5 I can set this off. I don't imagine that rebuttal and
6 closing summations are going to take much time. I can
7 give you a week. I can give you two weeks. I can do
8 it tonight.

9 It's up to you, Mr. Goldberg, how you'd
10 like to proceed in this fashion as we have had quite a
11 bit of case presentation tonight that was not
12 previously anticipated.

13 MR. GOLDBERG: Well, we're -- we're
14 prepared to -- to close and finish this proceeding.

15 I mean there -- you know, let me just
16 state that there's no -- we've checked many times.
17 We've got no submission from the government. So, I'm
18 -- we're going to object to any non-routine
19 submission.

20 Now, I understand the routine would be to
21 have I guess a transcript and then time to do proposed
22 findings of fact and conclusions of law. We're
23 certainly not going to object to that and we're happy
24 to do that as well.

25 But, you know, the idea that somehow we're

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1 going to get a new basis for a decision at this late
2 stage we don't think is appropriate, you know,
3 procedure to happen. I mean we think the record is
4 what the record is at this point.

5 CHAIRPERSON GRIFFIS: Okay.

6 MR. GOLDBERG: And we're prepared to, you
7 know, make a brief closing statement based on the
8 evidence that has come to light tonight.

9 CHAIRPERSON GRIFFIS: That's fine with me
10 and -- and I wasn't anticipating to keep the record
11 open for a week, but rather just give you additional
12 time to prepare --

13 MR. GOLDBERG: Sure.

14 CHAIRPERSON GRIFFIS: -- closings, but if
15 you're ready to go, I think we are.

16 MR. GOLDBERG: Okay.

17 VICE CHAIRPERSON MILLER: Can I ask one
18 question?

19 CHAIRPERSON GRIFFIS: Sure.

20 VICE CHAIRPERSON MILLER: Mr. Bello, I
21 just want to -- it's a very basic question, but I just
22 want to understand before I hear closing. When you
23 decide upon denying or accepting a permit -- granting
24 a permit, the project description here we've -- we've
25 heard discussion, well, there are different things.

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1 There's a scale. There's a roof. There's a floor,
2 whatever. Do you ever grant it in part? For
3 instance, if the scale has nothing to do with
4 structural alteration, would you be granting a permit
5 in part for work to replace the scale, et cetera?

6 MR. BELLO: That may very well be what the
7 correspondence between the applicant and the Denzel
8 Noble was about.

9 If -- in your primary review of an
10 application, an applicant who does not want to come to
11 the BZA reserves the right to modify the application
12 to -- to the extent that it is approvable as a matter
13 of right.

14 VICE CHAIRPERSON MILLER: When that
15 happens, do you give them some indication as to what
16 -- what they can do and what they can't do within the
17 project description as a matter of right?

18 MR. BELLO: Yes. Yes, that often occurs.
19 Yes, and our first preliminary review of applications
20 actually generate comments as to what the issues of
21 the application may be. So, at least afford the
22 applicant the opportunity to respond as to what
23 direction exactly it is they want to go.

24 VICE CHAIRPERSON MILLER: Okay. My last
25 question is did that occur in this case?

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1 MR. BELLO: It may very well have occurred
2 prior to my taking up the job. I don't know, but I
3 never personally met with the applicants.

4 VICE CHAIRPERSON MILLER: Thank you.

5 MS. BELL: And, you know, I -- I sort of
6 want to raise the point. As I understand the
7 applicants' argument, they have no idea what the basis
8 for the referral was or that they got this memo from
9 -- as a result of this appeal, that they never saw the
10 memo before.

11 MR. GOLDBERG: No, that's not our
12 position.

13 MS. BELL: Okay.

14 MR. GOLDBERG: No.

15 MS. BELL: So --

16 MR. GOLDBERG: Is a timing issue. We --
17 we did get it. We -- we -- once we knew that there
18 was an attachment alleged or talked about, we pursued
19 it and pursued it and finally, I think in late
20 November or December, we got it.

21 MS. BELL: Okay. And -- and so the -- so
22 the -- the specific provisions that are outlined in
23 this exhibit as the basis for the referral were
24 identified. Correct?

25 MR. GOLDBERG: We're challenging November

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1 3rd --

2 MS. BELL: Right.

3 MR. GOLDBERG: -- as what was identified.
4 That's right.

5 MS. BELL: Okay.

6 MR. GOLDBERG: True.

7 CHAIRPERSON GRIFFIS: Okay.

8 MR. GOLDBERG: Thank you and thank you for
9 member of the panel.

10 We appreciate the opportunity to put the
11 -- the factual evidence before the panel here. We
12 think this is a very straightforward matter.

13 We had a decision that is right before
14 you, it's Exhibit 4, that we're appealing from.

15 The word -- it's not a very long decision,
16 but the word enlargement is certainly a finding there.
17 They refer to it as a proposed enlargement.

18 We've heard tonight for the first time
19 testimony that said that that word had no relevance
20 there, but we would dispute that. It's I think -- you
21 know, when you have a record of a decision and it's a
22 pretty short decision and they refer to work as a
23 proposed enlargement and that's one reason why a
24 variance is being sought, then I don't think that can
25 be ignored, but the record is clear that there's no

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1 evidence of a proposed enlargement.

2 I mean we spent on the expansion issue and
3 we wanted to address that issue, but now, we hear that
4 their not making that claim.

5 So, that really goes to this non-
6 conforming/conforming issue. The evidence is before
7 the panel that when the Capitol Gateway Overlay became
8 final, 1605.1 included and I believe we've cited to
9 language in the legislative history if you will of the
10 Zoning Commission action.

11 That's from the January 5th D.C. Register
12 of 2005. That expressly states we're not trying to
13 get rid of industrial uses. We understand that's part
14 of what's going on in that area here.

15 The Office of Planning did consider this
16 to be part of a conforming use. So, there was no real
17 issue there as far as we're concern, but obviously an
18 issue that appeared was that well, even with the
19 conforming use, it can't be an enlargement or an
20 expansion. But, the record is now clear that DCRA is
21 not claiming they made such a finding.

22 So, therefore, you have a -- a conforming
23 use and there's been no finding by DCRA that there's
24 been any expansion.

25 So, let's go to the second part of it.

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1 They call it a non-conforming use and then do make
2 reference to 2002.4. Well, that's an erroneous
3 decision. That's a matter that we feel comfortable
4 the panel can -- can look at and -- and weigh in on as
5 to whether or not when you have the Zoning Commission
6 go out their way to put that language in there,
7 whether it's a nonentity. It means nothing. As no
8 legal significance whatsoever.

9 I mean there is -- it's a lot of case law
10 we could cite if necessary and I guess maybe we will
11 in our conclusions of law as to why that is not the
12 case.

13 The Zoning Commission, you know, with
14 their vested authority took the action they did in
15 this overlay and they did protect the existing
16 industrial uses in that regard and that's protection
17 we're entitled to.

18 Now, if the panel was to come out and say
19 well, we actually do find it's a non-conforming use
20 because we don't think that language does apply here,
21 there is no evidence in the record. There's no basis.

22 There's no record of decision. There's no finding.
23 There are no correspondence or, you know, notices or
24 any type of minimal due process where they've said,
25 you know, ETW, the problem we have with your -- your

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1 thing is it's a non-conforming use. This zoning
2 change is out there. It's effective and, therefore,
3 we think it's, you know, it's a structural alteration.
4 That was never raised before.

5 Maybe that came on. We've heard the first
6 time tonight that there's a new administrator and he
7 made that decision. But, you know, that's the first
8 we've heard of it.

9 So, we don't think you have to go there
10 because the law clearly states it's a conforming use
11 and everybody agrees that if it's a -- if it's a
12 conforming use, you don't get to 2002.4.

13 If on the other hand there is a
14 determination, then it's still arbitrary and
15 capricious because there's no finding whatsoever in
16 the record that this is a structural alteration nor is
17 there support in the record for that to be a structure
18 alteration.

19 I suppose if -- if the decision was made,
20 it's a -- a non-conforming use, one possibility would
21 be that the Board would remand it to the DCRA to have
22 a proper record made so that we can make a submission
23 on all the legal points as to why this work actually
24 was required so that we would not have issues in that
25 regard.

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1 And clearly, that also would not be the
2 case with the scale which he -- he has already -- the
3 witness admitted is not a structural alteration.

4 Well, we'll close it at that. We think
5 it's a straightforward case of a legal error, an
6 arbitrary and capricious error made by the DCRA. So,
7 therefore, this panel has jurisdiction to reverse that
8 decision on that basis.

9 Thank you.

10 CHAIRPERSON GRIFFIS: Thank you very much.

11 Do you have a current schedule? Okay. We're going
12 to get a date for a decision on this based on the fact
13 that we're going to need to get transcript. We're
14 going to set it off at least, two, three -- I think we
15 can make our first decision in May which would be the
16 3rd unless there's any difficulty with that.

17 Board members, I'm not keeping the record
18 open for anything at this point outside of proposed
19 findings and conclusions which means there would not
20 be any responses unless the Board feels differently on
21 that.

22 MEMBER ETHERLY: I'm -- I'm comfortable
23 with that, Mr. Chair. I think any -- any necessary
24 argumentation probably can be provided in the -- in
25 the proposed findings of fact and conclusions of law.

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1 CHAIRPERSON GRIFFIS: Okay. There it is
2 then. We'll set it for the 3rd of May. It is
3 possible then we'd have submissions in on the --

4 MR. GOLDBERG: Let me interrupt for
5 minute, Chair. I'm sorry. I missed that May 3rd
6 date. Obviously, it's a date I'd like to monitor, but
7 I am in -- doing a closing argument in an arbitration
8 in New York on -- on May 3rd.

9 CHAIRPERSON GRIFFIS: Okay. Of course,
10 that's our deliberation and decision.

11 MR. GOLDBERG: Right.

12 CHAIRPERSON GRIFFIS: There wouldn't be
13 any additional -- you wouldn't have to be here.

14 MR. GOLDBERG: No, I know I could send --
15 have somebody else. It's nice to have somebody here.

16 Well, we want a quick decision. So, we
17 can send somebody else here as long as there won't be
18 any need for clarification or anything from our side.

19 CHAIRPERSON GRIFFIS: I can --

20 MR. GOLDBERG: And that's fine.

21 CHAIRPERSON GRIFFIS: Well, there may well
22 be. You never know.

23 MR. GOLDBERG: Right.

24 CHAIRPERSON GRIFFIS: Although it's not
25 very often the case as we are in a public meeting not

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1 a hearing. It would -- we don't really have the forum
2 even to ask the question.

3 I don't have any difficulty setting it off
4 a week to the 10th.

5 MR. GOLDBERG: That would be preferable.
6 Right.

7 CHAIRPERSON GRIFFIS: The scheduled public
8 meeting is something that we would end up having to
9 call. Actually, the 10th would work quite well it
10 looks like.

11 MR. GOLDBERG: We appreciate that. That
12 would be preferable for our side.

13 CHAIRPERSON GRIFFIS: Okay. It would be a
14 special public meeting then for the 10th. We'll call
15 that at 9:30 which will delay our public hearings a
16 bit that morning.

17 I would have submissions in then -- well,
18 it's the day after -- so, it's going to be by 3:00 on
19 May 4th in the Office of Zoning. It certainly can
20 come in before that.

21 Okay. Any difficulty with that submission
22 on the 4th?

23 MR. GOLDBERG: Not at all. Thank you.

24 CHAIRPERSON GRIFFIS: DCRA, any
25 difficulty?

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1 MS. BELL: No.

2 CHAIRPERSON GRIFFIS: Okay. In which
3 case, I don't believe there's any other business for
4 us this evening unless there's any procedural
5 questions you have to ask. If there are none, very
6 well. Thank you very much. I appreciate your being
7 down here all night and all afternoon.

8 MR. NYARKU: Mr. Chairman.

9 CHAIRPERSON GRIFFIS: Yes.

10 MR. NYARKU: The special public meeting at
11 9:00 or 9:30? 9:00?

12 CHAIRPERSON GRIFFIS: Pardon me.

13 MR. NYARKU: The special public meeting.

14 CHAIRPERSON GRIFFIS: We're going to call
15 the special public meeting at 9:30.

16 MR. NYARKU: At 9:30?

17 CHAIRPERSON GRIFFIS: Right. It will just
18 delay our hearings on that date.

19 Okay. If there's nothing further, Mr.
20 Nyarku, are you aware of any other business for the
21 Board this evening? I can't imagine that there is.

22 Very well. Thank you all very much. And
23 we'll see you or at least note your presence at the --
24 the May hearing. Very well. We'll adjourn the
25 afternoon session.

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1 (Whereupon, the hearing was concluded at

2 7:41 p.m.)

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